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# NEW JERSEY EQUITY REPORTS.

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June 24

# REPORTS

OF

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CASES DECIDED IN

## THE COURT OF CHANCERY,

THE PREROGATIVE COURT,

AND, ON APPEAL, IN

89

The Court of Errors and Appeals,

OF THE

STATE OF NEW JERSEY.

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JAMES BUCHANAN, Reporter.

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CASES  
ADJUDGED IN  
THE COURT OF CHANCERY  
OF  
THE STATE OF NEW JERSEY.

MAY TERM, 1909.

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MAHLON PITNEY, CHANCELLOR.

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JOHN R. EMERY, FREDERIC W. STEVENS, EUGENE STEVENSON,  
LINDLEY M. GARRISON, EDMUND B. LEAMING, JAMES E.  
HOWELL AND EDWIN R. WALKER, VICE-CHANCELLORS.

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THE FERRY-HALLOCK COMPANY

v.

THE PROGRESSIVE PAPER BOX COMPANY et al.

[Decided May 19th, 1909.]

1. Where an issue was not precisely raised, nor expressly decided by the court, the decision was not conclusive on the issue.

2. A representation by a patentee that a certain thing is covered by his patent, made in good faith while bargaining with another as to a license,

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is not a representation of a fact on which the latter may rely, so that he cannot, on subsequently proving the falsity of the representation, repudiate the license.

3. A licensee who uses a patent is estopped from denying the licensor's title.

4. A licensee under a patent, who for fraud or otherwise has the right to repudiate the license, cannot repudiate it in part and claim under it in part.

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On bill, answer, cross-bill and replication.

*Mr. William Read Howe* (Messrs. *Howe & Davis*, solicitors) and *Mr. Bull* (of the New York bar), for the complainant.

*Mr. Philip J. Schotland*, for the defendants.

EMERY, V. C.

At the hearing I gave orally my views to some extent on the rights of the parties, reserving final determination for briefs on the following points—*first*, whether in the Ferry-Waring Company suit, referred to at the hearing, it had been expressly decided that the complainant's patents, or any of them, covered "stays" as well as "rings," and *second*, whether complainant's representation or claim at the time of procuring the license, that "stays" were covered by its patents, made to defendant under the circumstances proved, was such a representation of fact on which defendants were entitled to rely in making the contract, that defendants on proving its falsity were discharged from the obligation to pay royalty under the contract, and were entitled to rescind the contract.

Briefs have been submitted on these points, and on further consideration of the cause, I add the following brief statement to the views expressed at the hearing. The opinion of Judge Lacombe in the Ferry-Waring Company suit does not expressly decide the issue now raised, as to the distinction between "stays" and "rings" under the Ferry patents, nor was that issue precisely raised. It is not therefore conclusive on the question, and its bearing on this question is therefore to be considered only in connection with the evidence given at the hearing upon this subject.

As to the *second* question, further consideration confirms my impressions indicated at the hearing, that under the circumstances proved, complainant's representation or claim that the "stays" in question were covered by its patents, was *bona fide* and honestly made, and was a representation or claim which, in bargaining with defendants as to a license, it committed no fraud in making, and that the defendants being at that time actually claiming and acting on an adverse title—being the same title which they now set up and seek to establish by evidence—were not entitled to act on this representation or claim of title made by complainant as the assertion of a fact, the falsity of which, subsequently proved, would entitle them to repudiate the contract on this ground. No authorities have been referred to establishing that representations of this character, made under these circumstances, are representations of fact on which defendant had then the right to rely, but might subsequently disprove, when it so elected, by disputing the license.

The general principle is that the licensee, to the extent that he continues to use the license, is estopped from denying the licensor's title. *Clark v. Adie*, 2 L. R. 423; *App. Cas.* (1877); *Jones v. Burnham*, 67 Me. 93; 24 Am. Rep. 10 (1877); *Kinsman v. Parkhurst*, 18 How. (U. S.) 289.

This applies the same principle which estops a tenant from denying the landlord's title to the land occupied under the lease, and is an estoppel implied by law, even in the absence of an express estoppel, such as was made by the agreement here. If the defendants have the right, for fraud or otherwise, to repudiate the license, thus making themselves liable to suit as infringers, the repudiation in such case must be total and of all the privileges granted. They cannot, at the same time, claim under and against the agreement. In the present case, the agreement granted the right to use the Hallock machines for rings and fixed the royalties for both rings and stays on a basis which did not depend on the actual making of either stays or rings, and these entire royalties are due, under the agreement, if the defendants use any of the privileges conferred by the license, and do not expressly repudiate them all. Defendants admit the use of these privileges for making "rings" and offer to account for these, but



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Metropolitan Ins. Co. v. Clanton.76 Eq.

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the accounting can be only according to the express agreement and not otherwise, so long as any privilege under it is used.

I will advise a decree for accounting under the agreement, to be settled on notice, if necessary, and that the cross-bill be dismissed.

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## THE METROPOLITAN INSURANCE COMPANY

v.

GEORGIANA CLANTON et al.

[Decided July 31st, 1909.]

1. The interest of a person designated as beneficiary of an industrial life policy is a vested property right, subject to the terms of the policy, construed as applying to such vested right.

2. The fact that by the practice of the subordinate officers of a life insurance company, who received and forwarded to the company a notice of change of beneficiary, the policy was not forwarded with it, as required by a printed condition on the back of the policy, and that an endorsement on the policy of the change of beneficiary, likewise required, was not supposed either by insured or by them to be necessary, will not avail to change the beneficiary, and divest the right of the personal representative of insured to the payment expressly provided for in the policy.

3. A gift may be made of a policy payable to the representatives of insured, as of other choses in action.

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Heard on bill, answers, replication and proofs.

*Messrs. McCarter & English*, for the complainant.

*Mr. William A. Lord*, for the defendant Clanton.

*Mr. Arthur B. Seymour*, for the defendant Morgan.

EMERY, V. C.

At the hearing of this cause it was directed that the money paid into court by complainant as due on policy No. 25797999

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for \$112 should be paid to the defendant Clanton as administratrix of Morris Williams, deceased, the insured. The defendant Morgan disclaimed in her answer any interest in this policy. The question reserved was as to whether the defendant Rosella Morgan or Clanton, as administratrix, was entitled to the proceeds of the policy No. 21113295 for \$140, also paid into court. This policy is not a benefit certificate or certificate of membership in a benevolent association, but is a policy of life insurance of the kind known as "industrial" insurance. The policy contains an express agreement to pay the amount upon receipt of the proofs of death of the insured, and upon surrender of the policy and all receipt books, and as to the person or persons to whom the amount is payable or may be paid, a subsequent clause provides that

"The Company may pay the amount due under this Policy to the beneficiary named below, or to the executor or administrator, husband or wife, or any relative by blood of the insured or to any other person appearing to said Company to be equitably entitled to the same by reason of having incurred expense in behalf of the insured, or his or her burial, and the production of a receipt signed by either of them shall be conclusive evidence that all claims under this Policy have been satisfied."

In the policy "the name of the beneficiary and relationship to the insured" is given merely as "estate." On the back of the policy and under the title of "Privileges and Concessions to Policy-Holders," are printed several privileges or conditions, but these are not either expressly referred to in the policy itself as so endorsed, nor are they expressly signed by the company. One of these relates to "change of beneficiary," and is as follows:

"Subject to the approval of the Company, the insured may at any time during the continuance of this policy, provided the policy is not then assigned, change the beneficiary or beneficiaries, by written notice to the company at its Home Office, accompanied by this policy. such change to take effect on the endorsement of the same on the policy by the company. After endorsement the policy will be returned."

It has been settled by the decisions of this court as the general rule, that under provisions of this character as to change of beneficiaries, in the benefit certificate of benevolent associations,

the persons originally indicated as the beneficiaries have the right to insist upon a compliance with their terms, and that the provisions are not merely regulations whose enforcement is at the option of the company alone, and which are waived by the payment of the fund into court. *American Legion of Honor v. Smith* (Vice-Chancellor Van Fleet, 1889), 45 N. J. Eq. (18 Stew.) 466, 472; *Grand Lodge, &c., v. Connolly* (Vice-Chancellor Reed, 1899), 58 N. J. Eq. (13 Dick.) 180, 184; *Order of Heptasophs v. Dailey* (Vice-Chancellor Reed, 1900), 61 N. J. Eq. (16 Dick.) 145, 152; *Pennsylvania Railroad Co. v. Warren* (Vice-Chancellor Bergen, 1905), 69 N. J. Eq. (3 Robb.) 706, 708. This general rule requiring the change of beneficiary to be made in the manner pointed out by the policy and by-laws of the association, is subject to some exceptions (2 *May Ins.* §§ 399, 400, and *Lahey v. Lahey* (1903), 174 N. Y. 146, 155), and these exceptions seem to be based on the essential character of the right of the beneficiary in such certificate and the essential character of the designation.

The rights under these benevolent certificates are not vested property rights in the beneficiary, but are contractual rights only, depending on an appointment or designation. *Golden Star Fraternity v. Martin* (Court of Errors and Appeals, 1896), 59 N. J. Law (30 Vr.) 207, 215; *Anderson v. Supreme Council, C. B. L.*, 69 N. J. Eq. (3 Robb.) 176, 179 (opinion affirmed on appeal). A change of beneficiary in these cases is in the nature of the execution of a power. Such execution defective at law may in some instances be aided in equity, and most of the exceptions to the general rule come, I think, within the equitable principles applicable to such defective execution. Thus, wrongful refusal of the original beneficiary to deliver up the possession of the certificate will not avail to defeat the change where its production is required by the provisions of the certificate. *Polish National Alliance v. Nagbrabski* (Vice-Chancellor Bergen, 1906), 71 N. J. Eq. (1 Buch.) 621.

In contracts of the kind now in question, which are pure life insurance contracts, the interest of a person designated as the beneficiary is, on the other hand, a vested property right, subject to the terms of the policy, construed as applying to such vested

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right. And if any distinction is to be made between the different contracts in the matter of the construction or application of the terms of the policy, as to a change of beneficiary, it should be in the direction of a stricter construction of the life insurance contract, than of the benefit certificates, where no divesting of property occurs.

The policy in question, on the face of it, is a policy payable on the insured's death to his executors or administrators, and if the "privileges and concessions" printed on the back of the policy (before they are acted on) be considered as in fact part of the policy, although not referred to in it, then the right of the administratrix, so far as it depends on the policy itself, is to be divested only in the manner indicated, viz., "that the change shall take effect on the endorsement of the same on the policy by the company." The application for change was made in this instance, but was not accompanied by the policy, nor was the change ever endorsed on the policy. The circumstance that by the practice of the subordinate officers of the company, who received and forwarded the notice of change to the company, the policy was not forwarded with it, and that the endorsement on the policy was not supposed either by the insured or by them to be necessary, will not avail to change the beneficiary, and divest the right of the representatives of the insured to the payment expressly provided for in the policy.

In addition to her claim as beneficiary under the policy set up in her answer, it is claimed in the brief of counsel for defendant Morgan, that she had title to the policy by gift or donation from the insured in his lifetime, and that the policy was in her possession at his death and was afterwards delivered by her to the insurance company. A gift may be made of a policy of insurance payable to the representatives of the insured, as of other choses in action belonging to the insured. *Travelers Insurance Co. v. Grant* (Vice-Chancellor Pitney, 1896), 54 N. J. Eq. (9 Dick.) 212.

This claim of delivery and possession of the policy is denied by the defendant Clanton, and her counsel in his brief claims that the policy for a long time previous to the death of the insured was in the possession of his son, who paid the premiums and who

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delivered the policy to the administratrix after the death of his father. My notes of the evidence do not show any proofs on this contested point, as to the possession of this policy at the time of the application for change of beneficiary or at the time of the death. Neither is there any evidence tending to show that the insured made to Mrs. Morgan a gift of the policy, which was intended to confer on her an interest or right in the policy or its proceeds, different from that which she would have as a beneficiary designated under the policy.

In the absence of proof on these points the claim of Mrs. Morgan must be disposed of as resting solely on her right to the proceeds under the provisions relating to change of beneficiary, and for the reasons above given must be disallowed. If Mrs. Morgan, relying on the change having been made, paid the premiums subsequently accruing, an equity to the repayment of these may exist, and before advising decree, I will hear counsel on this point.

If, on examination of the stenographer's notes, it should appear that there was evidence as to the possession of the policy by defendant Morgan at the time of application for change of beneficiary, or at the time of the death of the insured, application may be made for a rehearing, if counsel desire.

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JOHN B. BALL et ux.

v.

SIDNEY S. WARD et al.

[Decided October 13th, 1909.]

1. Evidence *held* to show that a deed was induced by threats of the grantee of the immediate arrest and imprisonment of a son of the grantors for obtaining money from the grantee under false pretences.

2. A grantor, suing to set aside a deed induced by the threats of the

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6 Buch.Ball v. Ward.

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grantee of the arrest of a son of the grantor for obtaining money under false pretences, on the ground that the deed was executed pursuant to an agreement to stifle a criminal prosecution, must allege and prove that a crime had been committed by the son which was compounded, or the prosecution of which was stifled.

3. Evidence, in a suit to set aside a deed as induced by the threats of the grantee of the arrest of a son of the grantor for obtaining money by false pretences *held* not to show that the money was obtained under false pretences, and that the threats for his arrest were threats of unlawful imprisonment.

4. An agreement between debtor and creditor to compound a crime committed by the debtor, or to stifle the prosecution thereof, makes the transaction for the payment of the debt illegal, which illegality may be unconnected with the question of duress, for the illegal agreement may be offered by the debtor himself voluntarily and without any pressure from the creditor.

5. It is against equity for a creditor to extort from a parent payment of or security for the debt of a son, for which the parent is not responsible, by threats of criminal prosecution of the son, though an imprisonment of the son would be lawful or supposed to be lawful, and contracts of the parent for such payment or security, executed under circumstances created by the creditor which deprive the parent of the freedom and power of deliberation necessary to validate such transactions, may be avoided in equity, as made without consent.

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Heard on bill, answer, replication and proofs.

*Mr. Chandler W. Riker* (Messrs. *Riker & Riker*, solicitors),  
for the complainants.

*Mr. Alfred F. Skinner* (Mr. *Benjamin C. Demarest*, solicitor),  
for the defendants.

EMERY, V. C.

The bill is filed by John B. Ball and wife, to set aside two conveyances of land made by them to Sidney S. Ward, on November 29th, 1905, on the ground that they were executed under duress or threats. The duress alleged in their bill is that of threats of the immediate arrest and imprisonment of their son, Arthur D. Ball, for obtaining money of Mr. Ward under false representations. Complainants claim that under the pressure and influence of these threats, made to them on the Sunday preceding (November 26th, 1905), and, believing the threats would be carried

out, they agreed on that day to make the conveyances, without any opportunity for obtaining counsel or advice, and did afterwards make them while under such influence and pressure. Mr. Sidney S. Ward and his wife, Mary Ward, were the original defendants to the bill, filed March 31st, 1906, and their answer under oath (Mrs. Ward answering on information and belief) denies the duress or threats charged in the bill, and as to the circumstances of the execution of the deed, the answer avers that Arthur D. Ball, who was the son-in-law of Ward and had married his daughter and only child in January, 1902, had borrowed from Ward between October, 1903, and April 28th, 1905, \$23,500, besides procuring Ward's endorsement on March 21st, 1904, of Arthur Ball's note at three months for \$15,000, which note was renewed from time to time, and was outstanding at the time of the conveyances. All these advances and the endorsements are averred to have been procured by Arthur Ball on his statement to Mr. Ward that they were to be used by Arthur as his contribution to a joint venture or speculation in which he was engaged as one of a syndicate, and which promised to be very profitable. After endorsing the note, and on April 28th, 1905, Mr. Ward, as his answer avers, made another loan to Arthur Ball of \$3,800, to enable the latter to purchase a gas plant at Boonton. As to this advance there is no allegation in the answer that it was to be for Arthur's share or part in any joint venture or syndicate operation. The advances remaining unpaid and the note being twice renewed, Mr. Ward, having his suspicions aroused as to Arthur Ball's representations, made inquiries of the person whom Arthur Ball had represented to have charge of the joint venture, and, in the language of the answer,

"was informed by him that there was no such joint venture or speculation, and that at the times when the said Sidney S. Ward had loaned to the said Arthur D. Ball the various sums of money above mentioned, the said Arthur D. Ball had not paid said money to any syndicate in which the said Arthur D. Ball was interested with said person."

"Whereupon," the answer continues, "the defendant Sidney S. Ward became satisfied that the said sums of money had been secured from him by misrepresentations and fraud."

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The answer avers that subsequent to this information Ward caused an examination of the records to be made, and ascertained that on April 13th, 1898, Arthur D. Ball, for the expressed consideration of one dollar, had conveyed to his father, John B. Ball, property on Johnson avenue, in Newark, and that on January 8th, 1902, the day of his marriage to defendant's daughter, Arthur D. Ball had by a like deed conveyed to his father a house and tract of land at Deal, Monmouth county. The Johnson avenue house was the home of complainants, and up to the time of his marriage their son had resided there with them. The Deal place was a summer home in which, as is claimed by the answer, Arthur and his wife resided in the summer, and to the maintenance of which he contributed largely. Having ascertained these facts relating to the representations of Arthur Ball, and the conveyances of the property, the answer of Ward as to the circumstances of executing the deeds, says that on Sunday, November 26th, 1905, he called on complainants at their residence (the Johnson avenue property), told them that Arthur had obtained a large sum of money by these representations, that he had ascertained the representations were false and fraudulent, that Arthur was a bankrupt, and that inasmuch as the properties on Johnson avenue and at Deal had been conveyed to John B. Ball for one dollar, they, having received these properties by gift without consideration, should be willing to turn them over to the said Sidney S. Ward in part payment of the indebtedness of their son Arthur to him, and that thereupon the complainants expressed their sympathy for him, and regretted he had been wronged and offered to convey the properties. The use of any threats of the arrest or imprisonment of Arthur Ball at this interview or at subsequent interviews is also explicitly denied in the answer.

The bill charges a repetition of these threats of arrest at two subsequent interviews with Ward at his home on the same Sunday, one in the morning between Mr. Ward and John B. Ball, who had gone there to see his son, but did not see him, and another in the afternoon, in the bedroom occupied by Arthur, and at which Mr. and Mrs. Ward, Mr. and Mrs. John B. Ball and Mr. and Mrs. Arthur D. Ball were present. And it is



further charged that at the latter interview there was made a threat of immediate direction, by telephone, of the arrest, if the complainants did not at once agree to transfer the properties, and that under pressure of these threats they then made the promises.

All of these allegations of threats and pressure are specifically denied by the answer under oath, and it is averred that at all of the interviews at defendant's house the complainants were not only willing, but appeared to be anxious to turn over their properties to Ward.

Subsequent to the filing of the answer Mr. Sidney Ward died, and later, and before the hearing, Mrs. Ward also died. The suit was revived against the devisees and executors of Mr. Ward's will, of whom Mrs. Arthur D. Ball is one, and is now defendant, both individually and as executor and trustee.

At the hearing the direct evidence on the part of complainants as to the circumstances under which the agreement to execute the deeds was made, was that of the two complainants and their son, Arthur Ball. The evidence of the complainants was at first objected to as not admissible against the defendant executrix and devisee, but the objection was afterwards formally withdrawn. On the part of the defendants the direct evidence is that of the answers under oath, and of Mrs. Arthur D. Ball. There are circumstances appearing in connection with the evidence of all the witnesses called at the hearing, which to some extent affect their credibility as to details of the interviews, as given at the hearing, but the case is certainly one where the decision on the substantial question of fact in dispute depends on the credit given to the witnesses. This question is whether the conveyances were the result of such pressure by threats of Arthur Ball's immediate arrest on a criminal charge as to overcome the free will of the grantors in giving their consent to make the deeds and afterwards executing them. If the account of complainants and of Arthur Ball is true, then they were so procured, and on the other hand, if the answers and the account of Mrs. Arthur Ball are true, the deeds were not executed under any pressure, but were the voluntary acts of complainants for the purpose of repairing to some extent a wrong done by their son to Mr. Ward, and cannot now be rescinded.

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My impression at the hearing was that, duly weighing this conflict of evidence, the complainants had made out that the deeds were not voluntary, but were induced by pressure put on them by the threats of imprisonment. I retain this view on reading over the evidence again and further consideration, and there are certain undisputed facts appearing by the evidence which tend to corroborate this view and indicate that these deeds were executed under this pressure, and were not voluntary conveyances by the parents to pay the debts of their son.

The Balls were elderly people, both well over sixty, and Mr. Ball had but moderate means, being employed on a salary, and the deeds in question comprised about all his property. Mrs. John Ball herself had no separate estate or property.

The Johnson avenue property undoubtedly belonged to John Ball and was paid for and the homestead built thereon by his own means. His son originally purchased for \$1,000 the vacant lot on which there was a mortgage of \$3,000, and conveyed it to his father a few months later for the same price, which his father paid, subsequently paying the mortgage. To raise money the father sold another house in which he lived for \$5,600, and then built a house on the Johnson avenue lot costing about \$8,500 and using also for this purpose the proceeds of a mortgage on the lot for \$6,500. Arthur Ball seems to have had no money whatever in this property at the time of the conveyances. As to the Deal property the evidence that Arthur did not contribute toward the construction of the house is not so clear or satisfactory, but it does sufficiently appear that his father did advance money toward the construction, and that at the time of the conveyance to Mr. John Ball by Arthur at the time of the latter's marriage, John Ball had considerable money invested in the property, if he had not built it entirely, and so far as Arthur's subsequent creditors were concerned, no ground appears for supposing that John Ball's title to the property was subject to their claims.

In the early part of November Mr. Ward had searches made upon Arthur Ball's and John Ball's property, and after obtaining these, on Saturday morning, November 25th, had an interview with Mr. Uzal McCarter, the gentleman named as having con-

trol of the joint venture. On Saturday evening Mr. Ward had an interview with Arthur Ball at his (Ward's) home. At this interview Mr. Ward seems to have accused Arthur of having obtained his money under false representations, but so far as appears by the meagre account of it, given by Arthur and his wife (the only two witnesses), there was no reference in that interview to any conveyance of their property by Arthur's parents. On Sunday morning Mr. Ward went alone to the residence of the complainants, reaching there before breakfast, and had an interview, in which they learned for the first time, and from Mr. Ward, that their son was a bankrupt and had, as he said, obtained money wrongfully from him. That in this interview some reference to a conveyance of the two tracts held by John Ball was made, appears by the sworn answers and the evidence of both the complainants. One question is whether there was then and at that interview, which was not very long, any definite agreement or offer to make the transfer, as is set up in the answer. Mrs. Ball says that she was willing to make the transfer in order to save Arthur from the arrest which Mr. Ward threatened, but her husband was not, and wanted time to think about it. Her husband makes substantially the same statement. The interview ended by an appointment for a subsequent interview on the same day at Mr. Ward's house, corroborating somewhat Mr. Ball's statement that he was not ready to consent at once. After this interview, and in the morning, Mr. Ball went to his son's house in Clinton avenue to see him, but finding that he had gone to Mr. Ward's house in East Orange, went there about ten o'clock for the purpose of seeing his son. Mr. Ward met him and told him that his son was then lying down or asleep and should not be disturbed, and he then took Mr. Ball into his own room or "den." Previous to John Ball's arrival and when Arthur came to his father-in-law's house that morning, Mr. Ward told Arthur (according to Arthur's statement) that he had been down to his father's and had told his parents about his indebtedness and that if they did not turn over their property he (Arthur) would be arrested. Arthur then owned his home on Clinton avenue in Newark and offered to turn over this residence, but protested against Ward's demanding that his father's

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property should be turned over for his (Arthur's) debts. To this Mr. Ward replied "that if he didn't get it, he would have me arrested." There are two important features of this evidence—*first*, that Arthur, according to his own account, is now for the first time, as it would appear, advised that his father-in-law proposed to arrest him on some charge of criminality in his dealings with him, and *second*, that his arrest was to be made unless not only Arthur but his parents conveyed their property, and that now both Arthur and his parents knew of the threats. Arthur, after this interview with Mr. Ward, went to a room in the house to lie down and did not know of his father's visit to the house in the morning. Mr. Ward and Mr. John Ball had a short interview alone, as to which nothing important bearing on the matter of threats or conveyances has been sworn to on either side.

The afternoon appointment was kept, Mr. and Mrs. Ball first having an interview with Mr. Ward in the den, at which Mrs. Ward was present. Arthur Ball, from the bedroom near the den, in which he was lying down, heard the conversation. Arthur himself took no part in this conversation, but after this interview all four came over to the bedroom in which Arthur was. At the interview in the den and also in the bedroom, according to Mr. and Mrs. John Ball and Arthur Ball, the threats of immediate arrest of Arthur were made, unless the parents agreed to convey the properties, and as Mr. Ball hesitated to agree, Mrs. Ward was, as they say, sent to the telephone twice or three times by Mr. Ward, with directions to notify the lawyer to proceed at once. Mrs. Ball herself appealed to her husband to consent in order to save Arthur and finally he did consent, and in Arthur's room, where he and his parents met for the first time since they had information as to his father-in-law's claim against him, he was first informed or learned that his parents had given up all their property to pay a portion of his debts. According to his own and his father's and mother's statements this consent was forced from the parents by threats of his immediate arrest for crime in obtaining money from Mr. Ward, which threats were made to the parents within Arthur's hearing. According to the answers and also the testimony of Mrs. Arthur

Ball, this consent was then given in Arthur's presence, but as a voluntary offer of reimbursement, and without any threats, either then or previously made.

In considering the sworn answers and all the evidence relating to this interview, in which according to all of them, the consent to the conveyances was definitely given in Arthur's presence, I find one important feature on which there is no dispute. This is the fact that, although Arthur had no previous interview with either his father or mother relating to the charge against him or to his debts, and in this interview was first informed or first learned of their consent to make the transfer of all their property for his benefit, not a single witness who swears as to the interview, either in the answer or at the hearing, and including Arthur himself, says in his account that Arthur made any objection or protest whatever against his parents stripping themselves of all their property to pay his debts, or made any disclosure to them as to his debts, or expressed any gratitude to them. This silence, in which all witnesses agree, is fully explained and accounted for if Arthur then knew of the threats to his parents as well as himself of his arrest unless the conveyances were made, and was willing that his parents should make this sacrifice to save him. If the promise to convey was voluntary, this silence on Arthur's part is not, in my judgment, accounted for.

This same feature of the evidence—Arthur's silence on the question of the transfer of his parents' property—appears in the accounts as to the final interview on Monday morning at Mr. Ward's house, when the deeds for the properties (or copies of the descriptions) were delivered to Mr. Ward by Arthur, in the presence of the same witnesses. And there are some very important and undisputed facts appearing as the result of all the evidence and bearing directly upon the question, which are all consistent with the view that the promise to make the deeds was the result of some immediate pressure, but which are not satisfactorily explained on the view that the promise was a purely voluntary promise to pay Arthur's debts. These are the haste in which the promise was made, being the result of interviews on Sunday, the first day the parties met; the absence of counsel or advice to the Balls in relation to the apparently im-

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provident transfer of all their property to pay part of their son's debts, and the absence of any statements, agreements or examinations as to the amount of Arthur's debts which the conveyances were to pay, and of any arrangement at the time for any credit on the debts.

The concurrence of these undisputed facts indicate that for some reason a transfer was agreed on, which was to be immediate, and which left indefinite and unadjusted, matters which ordinarily would have been agreed on had the transaction been a mere voluntary conveyance by the complainants for the purpose of paying part of their son's debts.

The cumulative force of these undisputed facts is strongly corroborative of the complainants' direct evidence of undue pressure by the use of threats. Weighing all the evidence and considering it with the aid of the very full and able arguments of counsel on almost all its phases, I can reach no other conclusion than that the final agreement by complainants to convey the properties, and the delivery of the deeds to Mr. Ward for the purpose of having them drawn and executed, were procured by the threats of Arthur's immediate imprisonment if they were not executed. These promises were carried out and the deeds executed without delay or further interview between John B. Ball and Mr. Ward, and, as I conclude, while the complainants were still under the influence of this pressure. The complainants had no counsel or adviser then or at any time, and the formal execution and acknowledgment of the deeds as their voluntary acts, before Mr. Ward's counsel, and their conversation with him at the time without disclosing that they were the result of threats, while it is a circumstance to be considered in weighing their evidence, is not, of itself, sufficient to make the deeds voluntary acts, if the grantors executed them, as I conclude they did, under the belief, induced by the grantee at their previous interviews, that their son would be immediately arrested if the deeds were not made, and under the belief that if the deeds were made, directions for his arrest would not be given. The grantee allowed them to act on this belief, and gave the grantors deeds to his own counsel with direction for the conveyances to himself. This counsel states that at the interview in

his office, and before he signed the deeds, Mr. Ball inquired of him whether his son Arthur had done anything criminal, to which he replied that Mr. Ward had informed him (Demarest) that Arthur had secured money under false representations, and that was all he (Demarest) knew about it. This conversation shows that at the time of the execution and delivery of the deeds, the idea that Mr. Ward charged Arthur with crime was still impressed on the grantor, and the reply of counsel, whether so intended or not, would tend to confirm rather than lessen the effect of any threats, if they had been previously made.

The fact that complainants after finally making the promise to convey acted without any advice or counsel in the actual execution of the deeds of this character and delivered them without the execution of any other paper or statement for their protection, either in relation to Arthur's debts or their future rights of any kind in the property, confirms rather than challenges the view that the deeds were the result of the threats, and were not voluntary acts.

In reference to the execution of these deeds, I think the evidence further shows that there was at least an understanding between the parties, not expressed in words, but clearly implied, that if the deeds were made Arthur would not be prosecuted criminally at all. The arrest for the crime threatened was the immediate arrest; the directions for this were withdrawn on receiving the promise for the deeds, and this promise and the execution of the deeds were by all the parties treated as settling the matter of the arrest. The express agreement or direction reached no farther, perhaps, than the arrest then proposed, and there was not in express words any agreement that no future prosecution for the alleged crime should be made.

The question whether there was an agreement to stifle a prosecution which affected the deeds with illegality might be important if complainants asserted such illegality as a basis of relief, but as no arrest was made and no prosecution was actually pending, it would be necessary for complainants to allege and prove that in fact a crime had been committed, which was compounded, or the prosecution of which had been stifled. *Manning v. Columbian Lodge* (Court of Errors and Appeals, 1898), 57 N. J.

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*Eq. (12 Dick.) 338.* In the present case illegality of the deeds, as based on the stifling of a criminal prosecution, or compounding a crime, is not set up in the bill as a ground of relief, nor is it alleged that any crime was committed by Arthur, and on the contrary, at the hearing the complainants insisted that it appeared that the charge of misrepresentation made by the answer was shown to be false. It was the defendant who insisted that upon the proofs it was shown that the crime had been committed, and this proof was relied on as making the threats those of *lawful* rather than unlawful imprisonment—the essential element, it was claimed, of duress.

The status of the case as to the proof of the crime charged may thus be an element to be considered, and it is as follows:

The answer alleges that all the advances by Mr. Ward to Arthur and his endorsements for him from October, 1903, to April 28th, 1905 (including the endorsement for \$15,000 originally procured March 21st, 1904, and renewed from time to time every three months) were procured by Arthur on his statement that they were to be used by Arthur as his contribution to a joint venture or speculation in which he was engaged as one of a syndicate. The charge of the answer is that as Mr. Ward was informed in November, 1905, by the person named by Arthur as having charge of the venture for the syndicate,

“there was no such joint venture or speculation and that at the times when the said Ward had loaned to the said Arthur the various sums of money above mentioned, the said Arthur had not paid said money to any syndicate in which the said Arthur was interested with said person.”

Mr. Uzal McCarter, the gentleman referred to as thus having charge, was called as defendants' witness and testified that Arthur Ball was one of a syndicate with himself and several others for purchasing stock, and that the operations of this syndicate were closed out on December 31st, 1904, and that after this date Arthur Ball had no interest in any syndicate with himself and others, but that there was one joint venture after that date in which he and Ball were the only ones jointly engaged, in which, however, he (McCarter) had carried the account from the beginning. Mr. McCarter's further evidence is that Mr. Ward,



on his application to him for information, stated that Arthur Ball had borrowed large sums of money from him (Ward) and had not paid them back and had given as the reason for not paying that Mr. McCarter had not yet made distribution of the funds. This statement was not true, as Mr. Ward was then informed by Mr. McCarter, who immediately sent for Arthur Ball and demanded a retraction. Arthur Ball then denied to Mr. McCarter making any statement to Mr. Ward that he was withholding funds belonging to him. Arthur Ball himself says that he put \$10,000 into this syndicate and afterwards received this back, and although admitting that money was borrowed from his father-in-law to the extent of at least \$17,500 from October, 1903, to April, 1904 (besides the endorsement of \$15,000 in March, 1904), says that when borrowed it was on statements that he wanted it for use in speculation, but not on the statement that it was to be used in the syndicate. He further admits stating to Mr. Ward at the time of applications for money beyond the \$10,000 originally advanced to him to go into the syndicate, that the distribution of the funds of the syndicate had been delayed. It does not appear that he ever informed Mr. Ward that the syndicate operations had been closed out in December, 1904, while it does appear that after this date the \$15,000 note (a three months' note) was renewed more than once, Mr. Ward apparently being ignorant until November, 1905, of the fact that the syndicate operations were closed out and that there was no money from this source due to Arthur. As Arthur Ball had received back the \$10,000 put into the syndicate and had not paid anything to Mr. Ward, and Mr. Ward was still continuing the endorsements, the reasons for his not informing Mr. Ward that the syndicate operations had been closed and leading him to to suppose that they still continued, are quite apparent. As it appears by the proofs that Arthur Ball was originally one of the syndicate and did put into it some of the money advanced by Mr. Ward, and that the operations of this syndicate were not closed out until December 31st, 1904, after which date Mr. Ward advanced no more money to Arthur Ball, (except the \$3,800 which, as the answer states, was advanced for purposes other than this syndicate), it is clear, I think, that the particular charge of

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false representations set out in the answer, viz., "that there was no such joint venture or syndicate, and that Arthur had not paid any of the money borrowed to any syndicate," has not been established. It would rather seem from the evidence of Mr. McCarter that the false representation made to Mr. Ward probably was that the funds of the syndicate were still undistributed, and Arthur's own testimony, as well as his failure to disclose the termination of the syndicate in December, 1904, corroborates this view. Such statement and conduct of Arthur's would probably have induced the renewal of the endorsements of the \$15,000 note after December, 1904, but there is no proof that after the syndicate was in fact closed out any money was obtained from Mr. Ward on Arthur's statement that its funds were undistributed. I conclude, therefore, that the charge of crime set up in the answer that the moneys were obtained under the false pretences therein specified has not been made out, and that if the threats were for the arrest on this charge, they were not in point of fact made on the threat of lawful imprisonment. As Arthur had, however, while procuring from Mr. Ward the continuance of his endorsements of the \$15,000 note after December, 1904, continued to mislead Mr. Ward, or allow him to be misled, in reference to the closing out of the syndicate operations and his receipt of the money coming to him under them, Mr. Ward, upon receiving information in November, 1905, that there then were no syndicate funds for distribution, was perhaps justified in believing that deception had been practiced on him, justifying criminal proceedings, and on this aspect of the whole case the question arises, whether threats of imprisonment, either lawful or honestly supposed to be lawful by the person making threats, will avoid deeds made under their pressure by a parent.

Whether threats of lawful imprisonment by criminal proceedings, made to the debtor himself, in order to induce him to pay his own debts, are of themselves ground for setting aside the debtor's deeds or mortgages given to pay or secure the debt, under the pressure of the threats, where there is no agreement to compound a crime or stifle a criminal prosecution, is not the question involved in this case. As to the debtor himself, it may be said that his lawful prosecution either civilly or criminally can be no

wrong, and that his acts done in payment of the debts could not be avoided merely for threats of such legal pressure. An agreement, however, between the debtor and creditor, to compound the crime or stifle the prosecution, makes the transaction for payment of his own debts illegal, and the weight of authority seems to be that the debtor himself, although *in delicto*, may for this kind of illegality avoid his own contracts, upon the ground of the public policy, that a creditor is not permitted to trade on the public crime for his own profit. Illegality of this character, however, is, or at least may be, altogether unconnected with the question of undue pressure, for the illegal agreement may be offered by the debtor himself or his parents or other surety, voluntarily and without any pressure by the creditor, but this would not clear the illegality which inheres in the agreement itself, whatever its origin.

But the precise question in the present case is whether deeds made to the creditor by a parent of the debtor, and without consideration from the creditor, will be avoided in equity if made under the influence of such pressure of threats of imprisonment (lawful or supposed to be lawful), as to overcome the free agency of the grantor. In the single case in this court in which the question was said to be directly involved (*Lomerson v. Johnston* (1838), 44 N. J. Eq. (17 Stew.) 93), Vice-Chancellor Bird decided that a mortgage upon a wife's real estate was executed by her under such pressure of threats of her husband's arrest for embezzlement, as to overcome her free agency, and that in equity it should be set aside. The court of errors and appeals (2 Dick. 314, 1890) affirmed the decree, upon the ground, however, that the proofs showed that the creditor knowingly gave the wife the false impression that her husband was to be immediately arrested, and allowed the wife to make the mortgage under this false apprehension. It was held to be inequitable to permit him to retain the mortgage thus obtained.

As I understand the opinion of the appellate court the state of mind of the grantor in which the mortgage was executed was held to be of vital consequence to the validity of the security, considered as a contract based on consent, and if this state of mind inducing the deed—the fear of her husband's arrest—was

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procured by false impressions knowingly created by the creditor, his conduct in creating this state of mind to extort the consent was illegal, and the illegality vitiated the security in a court of equity, which would set it aside. Whether the security could have been retained had the same state of mind been induced and the consent extorted by threats honestly made, was not decided, and the circumstance that the appellate court, in disposing of the case, held that this question was not involved, prevents, as I take it, the opinion of Vice-Chancellor Bird on this point in the case below, from being considered as an authority controlling my decision on this part, although due weight must be given to his learned examination of the question. The decision of the appellate court, however, does seem to be express authority to the point that if the state of mind or motive of the wife, a stranger to the debt, in conveying her property to secure the husband's debt, was induced and her consent extorted by illegal acts of the creditor, such as fraudulently creating a belief of arrest, the security will be avoided in equity for such illegality, and this was decided upon equitable principles applicable to the validity of consent to execute contracts and without any inquiry or consideration of the application of the common-law doctrine of duress *per minas*. When this consent is procured by the creditor by a fraudulently created belief, or an unlawfully created fear (as in the *Loxton-Johnson Case*, *supra*), there seems to be no difference of opinion as to the right to avoid the contracts, the general equitable ground being that stated by Mr. Justice Holmes in *Silsbee v. Webber* (1898), 171 Mass. 378, 380, &c., viz., that of obtaining a contract by creating a motive from which the other party ought to be free, and which in fact is, and is known to be, sufficient to produce the result. He further says, *Ibid.* 381, that some of the cases allow contracts to be avoided obtained by the threat of unquestionably legal acts, and cites the leading English, New York and Massachusetts decisions. Mr. Justice Knowlton, in his dissenting opinion, also affirms this principle, and says (p. 384) that it is an abuse of process and misuse of the machinery of law, which the law will not permit, for one who reasonably believes his debtor to be guilty of crime, to extort the collection of a private debt by threats of prosecution and im-

prisonment for crime, these being proceedings intended only to impose punishment in the interest of the public, that contracts so procured may be avoided for duress, and that it is equally a wrong and an injury to accomplish the same results through threats of such abuse or process.

The ground taken by the defendant's counsel on this branch of the case, is, that in order to avoid these deeds in equity, as made under pressure of threats of imprisonment for crime, the pressure must be such as at common law amounted to duress *per minas*, and this, as is claimed, must be a threat of unlawful imprisonment as distinguished from lawful imprisonment; it is claimed that at common law duress *per minas* was not as a general rule pleadable by any person other than the one threatened with imprisonment, the only exception to this rule being duress to a husband, wife, parent or child, by threats of imprisonment of the wife, husband, child or parent. And it is then insisted that this exception, as to the person threatened, which gives the parent the right to question his contracts made by duress to his child, and as if he were himself the person threatened, did not change in favor of the parent, the nature of the duress to be proved, or give him the right to avoid deeds executed under pressure of threats of lawful imprisonment to the child.

It has been held in this court that mortgages by the debtor himself to secure his own lawful debts, claimed to have been executed under threats of lawful criminal prosecution, could not be avoided as made under duress, even if such coercion were proved. *Bodine v. Morgan* (Chancellor Runyon, 1883), 37 N. J. Eq. (10 Stew.) 426, 428. It was found, however, as matter of fact, in this case, that coercion was not established, but that the mortgage was in fact voluntary, and this same feature—the voluntary execution of the deeds or contracts—appears also in the other New Jersey cases of duress by threats of lawful imprisonment, either criminal or civil. In *Clark v. Turnbull* (Supreme Court, 1885), 47 N. J. Law (18 Vr.) 265, it is said (at p. 267), that there was no pretence that the imprisonment (of defendant's brother in a civil suit) was unlawful, or that the note of defendant sued on was coerced or even asked for by the plaintiff. In *Tooker v. Sloan* (Chancellor Runyon. 1879), 30

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*N. J. Eq. (3 Stew.) 394*, the legal proceedings threatened against the husband do not appear to have been criminal proceedings, and the property upon which the wife gave the mortgage to settle the claims against the husband was found to be in fact the husband's property, held by the wife in trust for him (at *p. 397*). Coercion does not seem to have been proved. In *Smillie v. Titus (Chancellor Runyon, 1880)*, *32 N. J. Eq. (5 Stew.) 51*, it is expressly found that the mortgage given by the husband and wife on the husband's property, to pay the husband's debt, arising from an embezzlement, was given voluntarily and that there was no ground to suspect oppression or imposition. In several other cases referred to by defendant's counsel, the general rule at law has been stated in the opinion as being that the duress must be by threats of unlawful imprisonment, but the precise point now in question, viz., whether as against a parent, being a stranger to the debt, contracts for paying or securing the debt of a child, procured by threats of his imprisonment in criminal proceedings and having the effect of overcoming free agency are valid either at law or in equity, has not been either considered or decided, except in *Lomerson v. Johnson*. The most thorough examination of the question of the equitable status of contracts so procured is in the leading English case, *Williams v. Bayley (1866)*, *L. R. 1 H. L. 200; 35 L. J. Ch. 717*, which has been approved and followed in many, if not all, of the American courts. In this case a father, under the pressure of threats by a creditor, of his son's imprisonment for a felony, gave a mortgage on his property, to secure the son's debt. There was no question in the case as to the commission of crime, and that the threats were of imprisonment, which if it took place would be lawful, for the son had forged the father's name on notes or bills, and the notes or bills, with the forged signatures, were delivered to the father upon his executing the agreements for security. On a bill filed by the father offering to return the notes, he sought to avoid the security on two grounds—*first*, of undue pressure in procuring their execution; and *second*, of illegality in compounding a crime. Vice-Chancellor Stuart, before whom the cause was tried, held that the agreements were void because executed under a pressure which drove the father to comply with

the terms exacted by operating on his fears, and deprived him of the freedom of action necessary to the validity of an agreement. *Bayley v. Williams*, 11 Jur. (N. S.) 236, 237. The question of illegality for compounding a felony was not considered, it being, as the vice-chancellor said (at p. 237), not the province of the court of equity to decide whether crimes or misdemeanors have been committed, and the decision was based entirely on the equitable principles relating to relief from contracts to which consent had been extorted by undue pressure and to which there was no real consent. On appeal the case was argued for the appellants by Sir Hugh Cairns, and for the respondents by Sir R. Palmer, both afterwards lord chancellors. The imprisonment threatened was clearly lawful, but in none of the arguments, nor in any of the opinions in either court, does it seem to have been suggested that the question to be decided depended in any way upon any common law rule, that in a case of this character duress existed only if the threats were of unlawful imprisonment. On the appeal the opinion of the three lord chancellors—Cranworth, Chelmsford and Westbury—who delivered the opinions, all agreed in affirming the decree. Lord Cranworth's opinion went upon the ground that a pressure put on the parent by threats to prosecute his son for forgery if the parent did not take upon himself the payment of his son's debts, and by promises not to prosecute if he did, was an illegal pressure; and he also found that one object of the agreement was to stifle a criminal prosecution. Lord Chelmsford agrees that the security in question was extorted from the father by undue pressure, and says that "the case comes within the principles on which a court of equity proceeds in setting aside an agreement where there is inequality between the parties, and one of them takes an unfair advantage of the situation of the other and uses undue influence to force an agreement from him." Lord Westbury, in his thorough and forcible opinion, places the case on the ground (35 L. J. Ch. 725) that the only motive appearing in the case to induce the father to adopt his son's debt was the hope that by so doing he would relieve his son from the inevitable consequences of his crime, and that the question therefore was whether a father, appealed to under such circumstances, to take upon himself an

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amount of civil liability, with the knowledge that unless he does so, his son will be exposed to a criminal prosecution, with the certainty of a conviction, can be regarded as a free agent." His opinion on this question, without hesitation, was "that no man is safe, or ought to be safe, who takes a security for the debt of a felon from the father of a felon, under such circumstances." He further holds that a contract to give security for the debt of another being a contract without consideration should be based on the free and voluntary agency of the individual who enters into it, and that it is clear that the power of considering whether he ought to do it or not, whether it is prudent to do it or not, is altogether taken away from a father who is brought into the situation of either refusing and leaving his son in that perilous condition, or of taking on himself the amount of the civil obligation. On this aspect of the case he concludes that the security given for the debt of the son by the father, under such circumstances, was not the security of a man who acted with that freedom and power of deliberation that must undoubtedly be considered necessary to validate a security of this description. On the other question involved, whether independently of pressure, the transaction was illegal as founded on an agreement to stifle a prosecution, and to give up evidence of crime—the forged bills—for the purpose of securing a private benefit, "it is," he says (at p. 726), "unquestionably a law, dictated by the soundest consideration of policy and morality, that you should not make a trade of felony."

In *Eadie v. Slimmon* (1862), 26 N. Y. 10, the same principle as to undue pressure was applied, declaring void an assignment of a life insurance policy by a wife to pay her husband's debts, procured by threats of his imprisonment, and under circumstances which overcame her free agency. Later cases in this state affirm this ground of equitable relief and hold that the fact that the threats are of lawful imprisonment do not make the transaction valid. *Adams v. Irving National Bank* (1889), 116 N. Y. 606, where money paid by a wife to the husband's creditor for his debt, under threats of his arrest, was recovered back. This is the rule also in Massachusetts, and in this state the securities given under these circumstances seem



to have been declared void in suits at law, under the issue of duress. *Harris v. Carmody* (1881), 131 Mass. 51; *Morse v. Woodworth* (1891), 155 Mass. 233; *Silsbee v. Webber* (1898), 171 Mass. 378.

The same rule that similar contracts procured under threats of prosecution from persons standing in these relations and under such pressure as to overcome free agency, will be avoided in equity, seems to be adopted in most, if not all, of the American courts. The latest cases, and from a number of states, are collected in 20 L. R. A. (N. S.) 486, in a note to the case, *Williamson, &c., Co. v. Ackerman* (1908), 77 Kan. 502; 94 Pac. Rep. 807. Many of the earlier decisions are collated in 26 L. R. A. 48 (note), and are also referred to in *Burton v. McMillan* (Fla., 1907), 42 So. 849; 8 L. R. A. (N. S.) 991, but as the cases I have above referred to at length sufficiently bring out the substantial reasons on which the cases proceed, further citation of cases in detail is unnecessary.

In my judgment, the equitable rule to be applied in this case is the one illustrated in these cases, viz., that it is against equity and good conscience for a creditor to extort from a parent payment of or security for the debt of a son for which the parent is not responsible, by threats of criminal prosecution of the son, even if the imprisonment be lawful, or supposed to be lawful, and that contracts of the parent for such payment or security executed under circumstances created by the creditor which deprive the parent of the freedom and power of deliberation necessary to validate transactions of this description, may be avoided in a court of equity, as made without consent. A decree will be advised setting aside the deeds.

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FREDERICK M. ROGERS

v.

ALICE CAROLINE BAILY.

[Decided May 21st, 1909.]

By will testatrix gave certain real property to a son, and provided that, on the son's death leaving no children, the property should go to her daughter, should the property have been sold or exchanged, the daughter should receive the value to the extent of \$4,000 and "should my daughter not be living at the time of my son's death, then the property or the equivalent to be given to my granddaughter."—*Held*, that the son took the property in fee, subject only to the executory devises, and the granddaughter took a contingent interest in fee.

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Mr. Frank Benjamin, for the complainant.

Mr. Benjamin G. Demarest, for the infant defendant.

STEVENS, V. C.

This is a bill to quiet title. The complainant, who is an uncle of defendant, alleges that under the will of his mother he has an indefeasible title in fee-simple in the house and lot known as No. 62 State street, East Orange. His niece, the infant defendant, by her guardian, answers and says

"that she is entitled to a contingent interest in fee in the above described premises; contingent upon the death of Frederick M. Rogers (the complainant) after the death of Minnie E. Rogers Baily and leaving no child or children him surviving."

It will thus be seen that the issue, and the only issue raised by the pleadings, is whether the defendant has a contingent interest under the will. The will was probated in the District of Columbia. A copy of it, with a certificate by the register of wills, was put in evidence. In this certificate the register says that the *will* and *codicil*, after having been duly proven, were

admitted to probate and record by order of the probate court, but he does not certify whether a memorandum purporting to have been signed by testatrix and appearing between the will and the codicil was admitted to probate as a part of the latter. The memorandum is unwitnessed. The original was not produced and the signature to it was not proved. The codicil does not in terms refer to it, and there is no direct proof as to where it was written on the original document. By her will Mrs. Rogers gave her house and lot, No. 50 North Eleventh street, Newark, to her son, the complainant. By the memorandum she certifies (if she wrote it) that the house and lot have been sold and that "the house and lot now refers to No. 62 State street, East Orange, N. J." It is conceded that complainant has no title to this latter house and lot under the will and codicil, unless the memorandum is by implication incorporated into them.

Counsel have handed me elaborate briefs on the question whether this memorandum is so incorporated. The proof is as yet insufficient to raise the question. As the document itself has been filed among the records of the probate court of the District of Columbia, there may be some difficulty in getting the evidence. In the view that I take of the case, however, it is immaterial whether the memorandum is part of the codicil. Whether it is or is not, the bill must be dismissed on the ground that the defendant, Alice, has a contingent interest in the land, and consequently the complainant's insistence that he is sole owner of an indefeasible estate therein cannot be sustained.

I will first consider the case as if the memorandum were incorporated in the will. It will then read as follows:

"I give and bequeath to my son Frederick M. Rogers my house and lot \* \* \* (No. 62 State St., East Orange, N. J.) \* \* \* In the event of my son Frederick M. Rogers' death, leaving no children or child, I give and bequeath to the survivor, my daughter, Minnie E. Rogers Bailey, the house and lot at 62 State St., East Orange. Should the house and lot have been sold or exchanged, my daughter is to receive the value of said house and lot to the extent of \$4,000. Should my daughter not be living at the time of my son's death, then the house and lot or the equivalent to be given to my granddaughter, Alice Caroline Bailey."

I am inclined to think that under this will Frederick took a fee-simple subject to executory devises to Minnie and Alice and

not a life estate. The act of 1784 provides that where there is a devise of land and the words "heirs and assigns" are omitted, and no expressions are contained in the will whereby it shall appear that such devise was intended to convey only an estate for life, "and (which means "or," *Morris v. LeBel*, 71 N. J. Eq. (1 Buch.) 43) no further devise thereof being made of the devised premises," all such devises shall be construed to convey an estate in fee-simple. In *Den v. Allaire*, 20 N. J. Law (Spenc.) 19, the judges thought that the act applied, although there was an executory devise over, and so, in one sense, a further devise. In *Brooks v. Kip*, 54 N. J. Eq. (9 Dick.) 468, Chancellor McGill, without, apparently, having had his attention called to *Den v. Allaire*, expressed an opinion to the contrary. If, in the present case, the will does not give Frederick a fee there is this somewhat singular result, viz., that Frederick would take a life estate, while Minnie and Alice would, on the happening of the contingency, take a fee, although the gift to them, like the gift to Frederick, is without words of inheritance.

In *Den v. Snitcher*, 14 N. J. Law (2 Gr.) 53, testator devised a plantation to S. C. and if he should die without issue then, at his (S. C.'s) decease, testator gave an undivided half over. He did not devise the other half. It was held that he intended that S. C. should have the whole in fee in case he had issue and that at all events he was the absolute owner of the half not given over. If the statute may operate where an undivided portion is given over, I do not see why it may not operate where a contingent estate—an estate that may never take effect—is the only interest so given. Such a gift presupposes a residuum of interest that may, in the event, be entirely undisposed of. Why may not the statute operate upon such residuum? Why should the testator, contrary to his evident intent, be held to have died intestate so far as the fee is concerned? It seems difficult to resist the conviction that the statute was passed to meet just such a case. The remedy would not, otherwise, have met the evil mentioned in the preamble of the act. As I read the decision in *Den v. Snitcher*, this was the view of Chief-Justice Hornblower.

But if Frederick takes only a life estate the result is not substantially different, for the undisposed of fee has descended upon

him and his sister Minnie, and Minnie has conveyed to him all her interest. Frederick holds the fee subject only to the contingent gift to Alice. The question is whether this devise to her is now subsisting. There can be no doubt that it is.

There are two classes of cases in our reports. In the first, testator gives land to A and, if he die, to B. It is held that B does not take unless A die in testator's lifetime. The reason is this: A's death is certain, consequently, the contingency expressed by the word "if" must necessarily be the implied contingency of A's not being alive at testator's death. There can be no other.

In the second class of cases the contingency denoted by the particle "if" is expressed and not implied. "I give my house and lot to A, and if A die without children to B." Here it is not necessary to *imply* contingency, for we find it actually expressed. The contingency is not A's dying, which is certain, but A's dying without children, which is uncertain, and may happen just as well after testator's death as before. To add to this contingency another, viz., that A's death without children must occur in testator's lifetime is to remake testator's will, not to construe it. Consequently, when nothing more appears, it has been held, quite uniformly, that the contingency must have its full effect and that it terminates only with A's death.

But provisions of this sort are generally complicated with other provisions. The will may, in the case of personalty, specify a period of payment or distribution, or in the case of realty, provide for a minority or interpose an estate for years or life. It may then become matter of doubt whether the expressions "death without children," "death without issue," &c., do not mean death prior to the period of payment or distribution, or during the continuance of the interposed estate. To solve this question we must discover the intention of the testator, not by reading those words as if they stood alone but by looking into other parts of his will.

In *Patterson v. Madden*, 54 N. J. Eq. (9 Dick.) 714, Chief-Justice Gummere lays down two rules for solving questions of this sort.

"First. If land be devised to A in fee and a subsequent clause

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in the will limits such land over to designated persons in case A dies without issue and A so dies, and the substituted devisees are *in esse* at his death and there is no other event expressed in the will to which the limitation over can fairly be referred, then A takes a vested fee which becomes divested at his death and vests in those to whom the estate is limited over.

"*Second.* Where there is an event indicated in the will other than the death of the devisee to which the limitation over is referable (for instance, the distribution of the testator's estate or the postponement of the enjoyment of the property devised until the devisee reaches the age of twenty-one or until the exhaustion of a prior life estate), such limitation over will be construed to refer to the happening of such event or to the death of the devisee, according as the court may determine from the context of the will and the other provisions thereof that the limitation clause is set in opposition to the event specified or is connected with the devise itself."

In that case it was held that looking at the context, the limitation over stood, not in opposition to the devise itself, but to the event of the devisees coming into possession. The prior case of *Pennington v. Van Houten*, 8 N. J. Eq. (4 Halst.) 745, was an instance of the same kind, while *Dean v. Nutley*, 70 N. J. Law (41 Vr.) 218, was a case of the opposite sort. There land was given over "if E. die without lawful heirs," and it was held that the devise over took effect upon E.'s dying without leaving issue at any time.

These were all cases in the court of errors. There are many cases in this court showing how these rules have been applied. They will be found cited in the recent cases of *Burdge v. Walling*, 45 N. J. Eq. (18 Stew.) 10, and *McDowell v. Stiger*, 58 N. J. Eq. (13 Dick.) 125.

The case in hand falls under the first of the two rules laid down in *Patterson v. Madden*. The limitations over are set in opposition to Frederick's death and to that event only. Minnie is to take if Frederick die without children. That is all. Alice is to take if Frederick so die and Minnie be not living at the time of his death.

It is further contended that the clause, "should my house and

lot have been sold or exchanged my daughter is to receive the value of the house to the extent of \$4,000," gives to Frederick an implied power of sale and consequently an absolute power of disposition. Reading the memorandum as part of the codicil (and on this assumption alone does Frederick take anything under the will) it would seem that the only sale that testatrix contemplated was a sale by herself. She had sold the first house given in her will to Frederick and she thought it possible she might sell the second. In the absence of a duty to be performed courts do not readily imply powers of sale. *Boylan v. Townley*, 62 N. J. Eq. (17 Dick.) 593; *Chandler v. Thompson*, 62 N. J. Eq. (17 Dick.) 724. Here the testatrix neither expressly directs nor expressly empowers a sale, nor does she designate the person to make one. But if testatrix had expressly authorized Frederick to sell, this would not defeat the contingent gift. If he sold he would, if the contingencies happened, be chargeable with the purchase-money, to the extent of \$4,000, for Alice's benefit. The case would not fall within the reason of *Downey v. Borden*, 36 N. J. Law (7 Vr.) 461, or *Wooster v. Cooper*, 53 N. J. Eq. (8 Dick.) 682, for he would not be vested with the absolute power of disposal for his own use or benefit.

It is further objected that the devise to Alice is void because uncertain. As the testatrix did not sell the house, it alone, in the event that has happened, is the subject of disposition. There is now no alternative or substituted gift. But even on the assumption that Frederick has power to convert, he will sell not for himself alone but for Alice as well. And the proportion of the proceeds that he must hold for her is not doubtful. "The equivalent" for the lot sold is the \$4,000, which testatrix, in terms, gives Minnie. To give effect to her obvious meaning as to Alice, we must read the will as if she had said,

"should my daughter not be living \* \* \* then the house and lot or the equivalent specified by me (viz., \$4,000) is to be given to my granddaughter."

If the memorandum heretofore adverted to be not incorporated in the will, complainant has no title except by descent as to the one-half and by purchase from Minnie as to the other. He

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takes no title by will. As the executory devise to Alice is well within the law against perpetuities, there can be no question but that it is good. It takes effect upon the happening of the contingencies already discussed.

The bill should be dismissed, with costs.

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## THE NATIONAL FIRE PROOFING COMPANY

v.

WILLIAM H. DALY et al.

[Decided June 28th, 1909.]

1. An assignment of money due a sub-contractor from the contractor for the construction of a municipal improvement did not give to the assignee any lien on the funds in the hands of the city to the credit of the contractor, under act of March 30th, 1892 (*P. L. 1892 p. 369*), providing for the attachment of such lien, until the sub-contractor had given the statutory notice required to perfect his own lien.

2. Creditors of sub-contractors for the construction of municipal improvements are entitled to a lien on the moneys due the contractor in the hands of the city under act of March 30th, 1892 (*P. L. 1892 p. 369*), giving such lien in favor of sub-contractors, their assigns, or legal representatives, &c.

3. Materialmen having furnished materials to a sub-contractor for the construction of a municipal building did not disable themselves from acquiring a statutory lien on money in the hands of a city applicable to the contract by taking an assignment of the sub-contractor's claim against the contractor.

4. Where a notice of a materialman's claim for a lien on money due the contractor for the construction of a municipal building for materials furnished a sub-contractor had appended a copy of the contract between such materialmen and the sub-contractor containing the terms, time, and conditions of the agreement as required by act of March 30th, 1892 (*P. L. 1892 p. 370 § 2*), the notice contained a sufficient statement of the terms of the contract.

5. Act of March 30th, 1892 (*P. L. 1892 p. 369 § 1*), gives a lien on money due a contractor for the construction of a city building to sub-contractors, materialmen, &c., on their compliance with section 2, which requires the service of a verified statement showing the amount of the



claim, that the materials were furnished to the contractor, and that they were actually used in the erection and completion of the contract with the city.—*Held*, that where a notice of a lien recited that there was due claimant from D., sub-contractor for the mason work on public school No. 9, \$6,630.49 for materials supplied in accordance with the contract between claimant and D., all of which had been fully completed, and the affidavit recited that there was due and owing claimant from D. \$6,630.49 for materials supplied on and about the construction of public school No. 9, in the city of Hoboken, the statement sufficiently averred that the materials were actually used in the erection and completion of the school under the contract with the city; the word "supplied" being used there in the sense of "furnish" and the word "about" being taken to mean "upon."

6. Where notice of a corporation's claim of lien on funds due the contractor for a public building for materials furnished a sub-contractor recited the state, under the laws of which the corporation was incorporated, it sufficiently stated the corporation's residence as required by act of March 30th, 1892 (*P. L. 1892 p. 370 § 2*).

7. Where the affidavit attached to a notice of a claim for a lien against the unpaid price of a public building contained no general verification, but merely asserted that the statement inclosed was a true account of the material furnished, together with the dates when the same was furnished, and the prices thereof as it appeared by the claimant's books, there was no verified statement of the terms and conditions of the claimant's contract required by act of March 30th, 1892 (*P. L. 1892 p. 370 § 2*), in order to perfect a lien, though the claim contained a statement of such facts.

8. Act of March 30th, 1892 (*P. L. 1892 p. 370 § 2*), declaring that before the whole work is completed, the claimant may file with the city's financial officer, notices stating the claimant's residence, verified by his oath or affirmation and stating the amount claimed, from whom due and if not due, when it will be due, the amount demanded, after deducting all credits and offsets, with the name of the person by whom employed or to whom the materials were furnished, and the terms, time given, conditions of his contract, and that the materials were furnished and actually used in the completion of the contract, did not mean that a verified notice stating the claimant's residence should be filed, and that another unverified statement reciting the additional facts should be filed, but that the claimant should file a single statement in which all the requisite facts should be verified.

9. Where a materialman's affidavit for a lien on funds due a contractor for a public building had attached thereto a paper styled "invoice" which, in addition to a recital of the date, kind of material furnished, and the prices, contained the words "Terms net 30 days. Goods f. o. b. New York," the claim contained a sufficient statement of the terms, time given and conditions of the materialman's contract as required by act of March 30th, 1892 (*P. L. 1892 p. 370 § 2*).

10. Act of March 30th, 1892 (*P. L. 1892 p. 370 § 4*), provides that no lien shall be binding unless an action is commenced within ninety days; section 6 authorizes the claimant to enforce his claim by a civil

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action, and section 7 declares that the plaintiff must make all parties who have filed claims parties defendant, and that the court may decide as to the extent, justice, and priority of the claims of all the parties to the action.—*Held*, that a claimant was not required to bring suit to establish his lien within ninety days, where he had been made a party to a similar suit by another claimant.

11. Such section further declares that no lien shall be binding unless a notice of pendency be filed with the financial officer of the city, township, or other municipality.—*Held*, that, while only one *lis pendens* need be filed, if it gives the required information, a notice was insufficient to protect the lien of one of several claimants where it contained no reference to such claimant or its alleged lien.

12. Under act of March 30th, 1892 (*P. L. 1892 p. 370 § 4*), each claimant is not required to give separate notice in case his claim is specified in the notice of another claimant, yet each may give notice, and, if he does so, his notice will protect his own claim and those of others mentioned therein.

13. A materialman's notice of suit to enforce a lien on funds due a contractor for a public building required by act of March 30th, 1892 (*P. L. 1892 p. 370 § 4*), was not defective because it was in the form of a letter, instead of a paper entitled in the cause.

14. The Bankruptcy act of July 1st, 1898 (*P. L. 1898 ch. 541 § 1; 30 Gen. Stat. pp. 544, 545; U. S. Comp. Stat. 1901 p. 3418*), does not invalidate liens of sub-contractors, materialmen, &c., on funds due the contractor for the construction of a public building created by act of March 30th, 1892 (*P. L. 1892 p. 369*).

On final hearing on pleadings and proofs.

*Mr. Edward Q. Keasbey*, for the complainant.

*Mr. Gilbert Collins*, for Lawson & MacMurray.

*Messrs. Northrop & Griffiths*, for the Trussed Concrete Steel Co.

*Mr. J. Merritt Lane*, for the Alpha Portland Cement Co.

*Mr. Wayne Dumont*, for the trustee in bankruptcy of Daly.

STEVENS, V. C.

This is a contest over a fund of \$11,219.86 paid into court by the board of education of the city of Hoboken, and admitted to be due from Alexander Whan, the contractor, to William H.

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Daly, a sub-contractor, in the erection of a public school in Hoboken.

Daly partially performed his contract and then failed. The following persons and companies filed verified notices of their claims for labor performed and materials furnished under the act of 1892 (*P. L. 1892 p. 369*), an act intended to secure to workmen and materialmen payment of their several claims out of any unpaid money due to the contractor from the municipality.

The claims and dates of service of notice are as follows:

1908.			
Jan.	13.	Trussed Concrete Steel Co.....	\$6,630 49
"	22.	National Fire Proofing Co.....	2,740 26
"	28.	Lawson & MacMurray.....	3,000 00
"	30.	American Safety Tread Co.....	689 00
Feb.	13.	Herbert J. Bessant.....	115 00
Mar.	5.	John Hart .....	35 00
"	"	Michael P. Gillis.....	70 00
April	4.	Alpha Portland Cement Co.....	1,444 74

Lawson & MacMurray claim priority over all the other claimants on the ground that they have, in addition to their verified notice, an assignment from Daly of moneys due from Whan antedating the filing of any of the notices.

The Alpha Portland Cement Company claims that the notices of the Trussed Concrete Steel Company, the National Fire Proofing Company and the American Safety Tread Company are defective, and therefore create no lien. The trustee in bankruptcy urges the same defects and says further that, as against him, the notices are invalid under the Bankruptcy act.

I will first consider the effect of the assignment. It reads as follows:

"NEW YORK, Dec. 21, 1907.

"*Mr. Alexander Whan, Hoboken, N. J.:*

"DEAR SIR—I hereby authorize you to pay to Lawson & MacMurray, a corporation, the sum of three thousand dollars (\$3,000.00) with interest from this date and which amount is for material furnished by them to me for School No. 9, out of any money that may be due to me after this date, and I hereby assign to said Lawson & MacMurray, out of the monies that are due and owing by you to me or which shall hereafter become due from you to me on account of said building the said sum of Three thousand dollars (\$3,000.00).

"WM. H. DALY.

"Witnessed by A. H. Sims.

"Dec. 23/07."

If this had been an assignment by Whan of moneys due and to grow due from the City, it would be governed by the case of *Somers Brick Co. v. Souder*, 71 N. J. Eq. (1 Buch.) 759, in which it was held by the court of errors and appeals that an assignment of a contractor's claim upon a municipality, prior in time, is prior in right. But this is not an assignment of a debt due from a city, but of a debt due from a contractor to a sub-contractor. That they are not identical—not an assignment of the same thing—is evident. Until Daly, by giving the statutory notice, had himself obtained a lien upon the funds in the hands of the city, Whan was under no obligation to pay any of it to Daly. He might have lawfully satisfied the amount due out of any other money in his hands. The debt due from Whan to Daly was in no sense part of the debt or fund due from the city to Whan. By the very terms of the statute the debt due from Whan to Daly was subordinated to the claims of those of the workmen and materialmen who gave the statutory notice, and if Daly assigned what was due from Whan to him he did it subject to their paramount right.

It was for some time a matter of doubt whether the creditors of sub-contractors had any lien upon the money in the hands of the city (*Somers Brick Co. v. Souder*, *supra*), but this doubt has been removed by the decision in *Herman & Grace v. Freeholders*, 71 N. J. Eq. (1 Buch.) 541, affirmed on appeal. If this class of creditors have such lien, it is necessarily paramount to Daly's right as an unsecured creditor to be paid by Whan, and therefore anyone claiming through Daly takes Daly's right and nothing more. Suppose Daly himself had given no notice, can anyone doubt that those who gave notice would not have had the precedence, and suppose Daly gave notice, would not those who took by assignment from him stand only in his shoes, with such priority or right as he had acquired by virtue of that notice, and nothing more?

Lawson & MacMurray do not, however, rest alone upon their assignment. They, too, gave a notice, which is third in order of date, and which, without doubt, conforms to all statutory requirements. It is too plain for argument that they did not

disable themselves from acquiring the statutory lien by taking the assignment.

I will next consider the claim of the Trussed Concrete Steel Company. It is said that its notice is imperfect—*first*, because it does not contain a statement of the terms, time given, and conditions of its contract; *second*, because it does not state that the materials were actually used in the erection and completion of the contract with the city, or even in the erection of the school; *third*, because the company did not give notice of the pendency of its suit.

As to the first objection I need only say that the notice has appended to it a copy of the contract between the Trussed Steel Company and Daly, and this contains the terms, time and conditions required by the statute. It was, indeed, intimated, though not decided, by Vice-Chancellor Pitney in *Hall v. Jersey City*, 62 N. J. Eq. (17 Dick.) 489, that the contract referred to in section 2 of the act of 1892 was not the contract between the materialman and the contractor, but the contract between the contractor and the city. This view has not as yet been adopted by the court of errors and appeals. Justice Collins, speaking for himself and some other members of the court, was unwilling to accept it as correct, but the point was not decided. The municipality does not need information about the terms of the contract between itself and the contractor, but it may be important for it to know what are the terms and conditions of the contract of the claimant with *his* contractor, be such contractor either the original contractor or a sub-contractor. It appears to me that the view of Justice Collins is the more reasonable.

The second objection is more serious. The statute in section 1 provides that any person who shall, as laborer, merchant, &c., perform any labor or furnish any material "on complying with the second section of this act," shall have a lien for the value of such labor or material upon the moneys in the control of the city, &c.

Section 2 provides as follows:

"*And be it enacted*, That at any time before the whole work to be performed by the contractor for any such city, town, township or other municipality is completed or accepted by said city, town, township or

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other municipality, and within fifteen days after the same is so completed or accepted, any claimant may file with the chairman or head of the department, council, board, bureau or commission having charge of said work, and with the financial officer of said city, town, township, or other municipality, notices stating the residence of the claimant, verified by his oath or affirmation, stating the amount claimed, from whom due, and if not due, when it will be due, giving the amount of the demand after deducting all just credits and offsets, with the name of the person by whom employed, or to whom the materials were furnished; also a statement of the terms, time given, conditions of his contract, and also that the labor was performed or materials were furnished to the said contractor, and were actually performed or used in the execution and completion of the said contract with said city, town, township or other municipality, but no variance as to the name of the contractor shall effect the validity of the said claim or lien."

It will be seen that the lien given by section 1 is made dependent upon a compliance with the provisions of section 2. One of the things required to be stated by section 2 is "that the materials were furnished to the said contractor and were actually \* \* \* used in the execution and completion of the said contract with said city." The fact that the labor and materials went into the building constitutes the equitable foundation upon which the statute rests. The legislature deemed it reasonable that that which went into the work should be paid for out of its price. Obviously, if the contractor has diverted the material to some other object, the claim is properly not against the building or its price but against him.

Although I take this view of the subject, I have, nevertheless, with considerable hesitation, come to the conclusion, looking at the notice proper, the contract and the affidavit appended to it as all parts of one statutory notice and statement, it does sufficiently appear that the material was actually used in the execution of the contract with the city.

The notice says:

"There is due to us from Wm. H. Daly, sub-contractor of Alexander Whan, contractor, for the mason work on Public School No. 9 \* \* \* \$6,630.49 for materials supplied in accordance with the contract between us and the said Wm. H. Daly, all of which is fully completed."

The affidavit says:

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"There is due and owing to said claimant from said William H. Daly the sum of \$6,340.49, for materials supplied in and about the construction of public school No. 9 in the City of Hoboken."

The antecedent to the words "all of which is fully completed" are the words "mason work." It is, therefore, stated that the mason work on the building has been fully completed. If this were all it would not be a necessary implication that the "reinforcing steel" furnished by the claimant to the sub-contractor was actually used in the work. The mason work might have been completed by means of some other kind of construction or by means of girders, &c., furnished by someone else. But the affidavit appears to negative this possibility when it says that the money is due for the material—that is, the reinforcing steel—supplied *in and about the construction of the school*. One of the meanings of "supply" is "furnish." If the materialman furnished the steel wanted in the construction of the school, and the work in which it was wanted was "fully completed," and if, moreover, it was supplied in and "about" (which latter particle, I think may be taken as meaning "upon") the construction, the inference would seem to be unavoidable that the material was actually used in the execution of the contract with the city. It is a fair inference, in the absence of proof to the contrary, that "full completion" was completion according to the contract.

As it has never been held that the very words of the statute must be repeated in the notice I am inclined to think that what is stated, taken as a whole, amounts to the same thing. As was very recently said by the court of errors and appeals in the somewhat analogous case of a chattel mortgage, whose statutory affidavit of consideration was attacked, "it is immaterial that it was inartificially drawn and not technically precise." *Howell v. Stone*, 71 Atl. Rep. 914. The third objection, which affects other claimants as well, I will consider later.

The claims of the National Fire Proofing Company and the American Mason Safety Trust Company may, conveniently, be considered together, because, except in their statement of amounts and persons, they are expressed in the same terms. The claims consist of a notice, an affidavit and a transcript of the book account. The objection to them is threefold. It is said (1) that

they do not state the residence of the claimant; (2) that they do not contain a *verified* statement of the "terms, time given and conditions of the contract," and (3) that no notice of pendency of suit was given.

The first objection is disposed of by the case of *Hall v. Jersey City, supra*. Vice-Chancellor Pitney there observes that the only proper residence of a corporation is the state in which it is incorporated. The state of incorporation is given in each of the claims. Had the statute required the place of business to be stated the objection would have been more serious.

The second objection involves the proper construction of section 2, quoted above. The act was called by Justice Collins in the *Hall Case* "crude legislation." If this may be said of the act as a whole, it is also true of the section under consideration. The question is how far does this ambiguous section require the claimant to verify his claim.

I think it will be conceded that something more than verification of the claimant's residence was intended. The collocation of the words is unhappy but it is not to be supposed that the legislature intended to require that an unimportant fact should be verified and that all the important facts should be left unverified. But if more than verification of the residence be conceded, then it is difficult to believe that the legislature intended that the most important fact of all—that which, as I have said, constitutes the *raison d'être* of the act, to wit, that the labor or material went into the building, should not be verified. It is possible, of course, to argue that the verification should extend not only to the residence but to all the particulars down to the words "also a statement," but I hardly think it was designed to require two papers, first, a notice, verified by affidavit, containing a statement of the less important particulars, and secondly, a statement, unverified, containing the controlling fact. The whole scope of the section points to a single verified notice, including *all* the required particulars. If the word "containing" be implied before the words "a statement of the terms," &c., the difficulty in construing the clause vanishes. The change from the participial construction "stating," "giving" to the substantive "also a statement" cannot weigh much in the construction of this



clumsy and ungrammatical clause. The very draughtsman of the notice under examination had no idea that he was to prepare first a notice verified by affidavit and then an unverified statement. He has included all the particulars in one notice. The difficulty is that he has verified only some of those particulars.

This view accords with common practice, for, as far as I am aware, no one has thought it necessary to file first a formal notice of certain particulars, verified by oath, and then a formal statement of other particulars.

It may be proper to remark that whichever way this case is decided, some of the claimants will be unjustly excluded. If the word "his" be held to refer to the contract of the sub-contractor with the contractor, or the contract of the contractor with the city, then the claim of the Trussed Concrete Steel Company, already considered, must be excluded, for it contains a statement of the terms and conditions of neither. If the word "his" be construed as referring to the contract of the Fire Proofing company then its claim will be excluded for the reason I am about to state. If both claims should be deemed free from objection, then the claim of the Alpha Portland Cement Company, whose verification is in all respects full and satisfactory, will not be paid for the fund will be exhausted by the preceding claimants. The fact is that inasmuch as the price of the building is treated as a fund to be distributed among those whose labor and materials have actually gone into the work, it would seem that it ought to be divided, *pro rata*, for all these claimants stand upon an equally meritorious footing. It is not a case to which the maxim *qui prior est in tempore, potior est in jure*, is properly applicable. Such, however, is not the statutory scheme and the court must enforce it as it finds it.

I cannot find in the claim of the Fire Proofing company a *verified* statement of the terms and conditions of its contract. The so-called *claim* contains such a statement, but the *affidavit* appended to it does not. The affidavit contains no general verification. It asserts merely that "the statement hereto annexed is a true account of the said material \* \* \* together with the dates when the same were furnished and the prices thereof as appear by the books of the company." In *Hall Co. v.*

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6 Buck.National Fire Proofing Co. v. Daly.

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*Jersey City*, 64 N. J. Eq. (19 Dick.) 766, the court of errors and appeals held that as the testimony showed there were no terms, time given or conditions, there were none to be stated. The fire proofing company's claim cannot be sustained on any such ground. It has not proved that there were no terms, time given, or conditions. On the contrary, its *unverified* notice of claim shows that there were. It may be urged that "the statement hereto annexed" should be held to include not only the paper headed "statement" but also the notice. But both the notice and the affidavit evidently refer to the "statement hereto annexed" as a separate and distinct paper—the paper that contains the transcript from the books of account. To hold that it included the matter contained in the notice would be to hold something that the affiant never intended to assert.

I have more difficulty with the claim of the Tread company. The affidavit is identical with that of the Fire Proofing company, but the statement thereto annexed is not headed "statement" but "invoice," and it differs from that of the fire proofing company in saying, in addition to the date, kind of material and price, as follows: "Terms net 30 days. Goods F. O. B. New York." This appears to be stated in connection with the price and as affecting it, which it probably does. If this be included in and be part of the true account of the material furnished with the dates and prices, it is verified by the affidavit. I am inclined to hold, as a matter of construction, that it is. This, however, does not save the claim as will be shown presently.

It is furthermore insisted, as against the Tread company and the Trussed Steel Company, that they cannot participate in the fund because they commenced no action within ninety days from the filing of their lien. *Somers Brick Co. v. Souder*, 70 N. J. Eq. (4 Robb.) 388, is relied upon to support this contention. That case does not appear either to discuss or to decide the precise question here involved, which is whether, if a suit be commenced by a lien claimant within ninety days and the other lien claimants are made parties and answer, the defendants thus made parties must each commence a separate suit, in order to preserve their respective liens. The insistence seems to be answered by section 7 of the act, which provides that the

plaintiffs *must* make all parties who have filed claims parties defendant and that the court *may* decide "as to the extent, justice and priority of the claims of *all* the parties to the action." When it is considered that this is the general practice in equity and that the statute in question has been construed by our highest court to afford an equitable and not a legal remedy (*Delafield Construction Co. v. Sayre*, 60 N. J. Law (31 Vr.) 449), it would seem that a single suit is all that is required. There is nothing in the statute that, as far as I can see, even suggests a different construction. Section 6 does, indeed, say that any claimant *may* enforce his claim by a civil action, but this section does nothing more than authorize any claimant who has a cause of action to enforce it in the way prescribed by section 7, namely, by making all persons who have filed claims parties. The act nowhere declares that the penalty of not suing as plaintiff shall be the loss of the lien. Section 4 only prescribes that no lien shall be binding unless *an* action be commenced within ninety days. If the act were as clear in other respects as it is in this I should think it above criticism. The New York cases are in accord with this view. 5 N. Y. Sup. 918; *Neuchatel Asphalt Co. v. Mayor*, 33 N. Y. Sup. 64; 155 N. Y. 373.

What seems to me, however, to be a fatal objection to the Tread company's claim is that it gave no notice of the pendency of suit nor did any other party give a notice which named it. Section 4 reads as follows:

"No lien provided for in this act shall be binding upon the property therein described unless *an* action be commenced within ninety days from the filing of the same and a notice of pendency of said action be filed with the financial officer of said \* \* \* municipality."

As section 7 expressly says that the plaintiff *must* make all parties who have filed claims parties, it would seem reasonably clear that when section 4 says that *a* notice must be filed, one notice only is required if it gives the necessary information. Such was the view of the supreme court of the State of New York, from which state our act was taken, in *Newman Lum. Co. v. Wemple*, 107 N. Y. Sup. 318. In the appellate division the court says: "The main object of filing a notice of pendency is

to furnish people who are interested in the property or fund with a knowledge of what is going on, and that certainly was done by the notice of pendency filed by the plaintiff. \* \* \* I do not think it necessary for each of the defendant lienors to file separate notices of the pendency of the action. It was entirely sufficient if the plaintiff filed a proper notice, *including the names of the defendants to save their rights as lienors.*"

Three of the parties gave the statutory notice but none of them mentioned the Tread company as a defendant or party to the proceedings. The Tread company is therefore excluded from the benefit of the notices, if the Appellate Division rightly interpreted the act. That it did so seems to me apparent. The notice must be actual notice; not information that will put the financial officer on an inquiry that may, if pursued, lead to notice. The question, then, is what minimum of information will satisfy the statute. I think that the notice must at least state the general character of the suit and the parties complainant and defendant who would avail themselves of its benefits.

If the financial officer should be notified only that A had sued B, surely that would not be enough, and if he should be notified that a proceeding to enforce claims against the board of education had been begun, the parties not being named, that would give no information. It is argued that the subpoena served upon the board was notice to its financial officer. No doubt it would be if the statute had not, in addition to suit commenced, required notice to a particular officer. It is not pretended that the subpoena was served upon this officer. What Vice-Chancellor Grey tersely said in *Somers Brick Co. v. Souder*, 70 N. J. Eq. (4 Robb.) 390, is true here. "The statute creates a right of action which, theretofore, had no existence. It prescribes certain conditions and limitations and declares that if they be not observed, the right given only by the statute shall not arise or shall be defeated."

How strictly the courts feel themselves bound to deal with these statutory liens is exemplified by *Daley v. Lumber Co.*, 70 N. J. Eq. (4 Robb.) 343; *affirmed*, 71 Atl. Rep. 1133. In a case of this sort all the claimants are, in a sense, actors. I do not

think that each actor is obliged to give notice that all the other actors have commenced suit or are parties to a suit against the board. It is enough that each gives notice for himself. If he does, the notice will protect his own claim. If he goes further and mentions other claimants by name, that, I think, will protect those named, for the object of the notice is answered as to them and the statute does not, in terms, require that it be given by anyone in particular. But I do not think that a notice to the financial officer that A is a party to a suit against the board is notice that B is. As none of the notices mention the Tread company I am obliged to conclude that that company has not brought itself within the requirements of section 4.

The notice given by the Trussed Concrete Steel Company was in the form of a letter written by its attorneys, Messrs. Northrop & Griffiths. It contains the required information. The fact that it is in that form and not in the form of a paper entitled in a cause does not make it any the less notice. It mentions the name of the complainant, the National Fire Proofing Company, and although that company gave no notice, I am of opinion that its claim would be saved had it otherwise complied with the requirements of the act. But as I have already said its original notice was not sufficiently verified.

The result is that the Trussed Concrete Steel Company, Lawson & MacMurray and the Alpha Portland Cement Company, whose notices are sufficient, have preferred claims.

The order given by Daly to the Inter-State Engineering Company is disposed of by what I have said of that given to Lawson & MacMurray.

The Bankrupt act does not invalidate the liens created by the statute. *Fehling v. Goings*, 67 N. J. Eq. (1 Robb.) 386.

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6 Buch.Bell v. White.

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CHARLES J. BELL, administrator,

v.

SUSAN BIRD WHITE.

[Decided July 19th, 1909.]

1. Where the extent of a widow's claim to personal property under a will was doubtful, a family settlement entered into by all parties in interest who are of full age without fraud, would not be set aside because of alleged inadequacy of consideration in so far as it affected one of the parties.

2. A trustee named in a will was not disqualified to act because it was a foreign corporation.

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On bill and answer.

*Mr. George Gilbert and Mr. Gilbert Collins*, for the complainant.

*Mr. Robert J. Bain*, for Emily White Sandford, Elizabeth White Reid and Edward L. White.

*Mr. Carl M. Herbert*, for J. Paul White.

STEVENS, V. C.

My difficulty in this case has been to understand what there is to decide. The questions propounded seem to be concluded by the agreement entered into. The case comes up for hearing on bill and answers. The answers admit the allegations of the bill; and this is as true of the answer of J. Paul White as it is of the other answers.

It appears that John H. White died on December 10th, 1907, leaving a will by which he bequeathed considerable personalty to his wife and children. The will is, in some respects, difficult to construe, and the widow and children—all of age—for the purpose of facilitating a settlement of the estate, joined in an

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agreement dated March 24th, 1908, by which they undertook to divide the property on the basis of what they doubtless considered to be the real meaning of the testator. This agreement they re-affirmed with some modifications, grounded on the condition of the property and the extent to which it was liable for testator's debts, by a supplemental agreement dated April 15th, 1909. The administrator with the will annexed followed up this agreement, to which he is a party, by filing a bill on April 26th, and answers were filed on May 1st. The proceeding appears to be entirely amicable.

By his will testator gave the income arising from five hundred shares of Mergenthaler Linotype stock to his wife, and provided that the said stock or any portion of it remaining after her death was to revert to the estate for final distribution. The question arising on this bequest was whether the wife took a life estate or took absolutely. A gift of income without limitation as to continuance is a gift of principal. Does the provision providing for a reverter of the stock or *what remains of it* after the wife's death cut down her interest to a life interest, or is it without effect? Under the case of *Rodenfels v. Schumann*, 45 N. J. Eq. (18 Stew.) 383, the question is at least doubtful. There are some expressions in the will that may be thought to favor the one construction and other expressions that may be thought to sustain the other. Such being the situation, the parties came together and agreed that the wife should have a *life* interest merely, and that three of the children—Emily, Elizabeth and Edward—should take the remainder. It is said by the counsel of J. Paul White that this disposition is detrimental to Paul, the other child. So it may be (though even this is not free from doubt) if the widow took only a life estate. But Paul is of age, and signed both the original and the supplemental agreements, and does not object to either of them by his answer. There is no pretence that he has been the victim of fraud or dominating influence, and by the second agreement, at least, he undoubtedly secured an advantage. His legacy of other stock of the same company was not reduced in amount as were the legacies of the other children, because of the necessity of selling a part to pay debts. In this situation the remarks of Sir John Leach in

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*Naylor v. Winch*, 1 Sim. & S. 565, appear to be exactly in point. Speaking of a similar situation, viz., that of a will construed by a subsequent agreement, he says: "Where a compromise of a doubtful claim is entered into fairly and with due deliberation and upon consideration, a court of justice cannot inquire into the supposed adequacy or inadequacy of the consideration. Where is it to find a scale for determining the true measure of adequacy? If a court is in such a case to be governed by its judicial opinion upon the rights of the parties, then to him who by that opinion is held to be entitled to the whole property no consideration can be really adequate which is less than the whole and no compromise can ever bind the successful claimant. It is for this reason and because I consider it to be wholly immaterial for the purpose of deciding upon the validity of the deed of compromise that I do not give any opinion upon the arguments by which the counsel for the plaintiff assert her claim. \* \* \* It is enough to support this deed that there was a doubtful question and a compromise fairly and deliberately made upon consideration, and the actual rights of the parties (*i. e.*, under the will), whatever they might be, cannot affect the question."

Family settlements, fairly obtained, are always regarded with favor. *Stapilton v. Stapilton*, 2 Lead. Cas. Eq. \*920; *Hewitt v. Crane*, 2 Halst. Ch. 171.

This disposes of the first, second and third questions propounded by the bill.

As to the fourth question there seems to be no legal reason why the American Security and Trust Company, although it is a corporation of another state, may not act as trustee, the testator having named it as such. *Perry on Trusts*, §§ 42, 55; *Meinertzhagen v. Davis*, 1 Coll. C. C. 335. The question of its ability to take an oath is not involved.

As to the fifth question there can be no doubt that the will, in directing the trustee to hold the residuary estate for seven years from testator's death, and to hold the legacies to Paul until the happening of one or the other of the contingencies named therein, does not violate the rule against perpetuities. *Siedler v. Syms*, 56 N. J. Eq. (11 Dick.) 275.



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Whether, as a matter of discretion, the trustee, being a foreign corporation, should be required to give security has not been discussed.

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SOPHIE ZELMAN et al.

v.

HENRYETTE KAUFHERR.

[Decided August 6th, 1909.]

1. A doubt about a title to render it not marketable must be a rational doubt, or real and not fanciful.

2. An action at law for damages for breach of a restrictive building covenant can only be brought against the person by whom broken, and not against a subsequent grantee.

3. An application for a mandatory injunction to protect a restrictive building covenant must be promptly made.

4. To warrant a mandatory injunction to protect a restrictive building covenant, the common scheme of building must have been actually preserved.

5. Adjoining owners who not only stood by while a building was erected in violation of a restrictive building covenant, but have themselves violated such covenant, are not in a position to complain.

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*Mr. Adrian Riker*, for the complainants.

*Mr. Samuel F. Leber*, for the defendant.

STEVENS, V. C.

This is a suit for specific performance of a contract to purchase real estate in Newark. The only defence made is that in the deed from Emily Martin, the complainants' grantor, to the complainant, there is a restriction "that dwellings are the only buildings to be erected on the front portion of said lots \* \* \* and shall be kept back ten feet from the street line." The aver-

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6 Buch.Zelman v. Kaufherr.

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ment of the answer is that the complainant erected buildings six feet from the street line and that it would, therefore, be hazardous for her to accept a conveyance.

It is not averred in the answer that Mrs. Martin owns any other land in the neighborhood for the benefit of which the restriction was imposed, or that she is herself under any obligation to her grantor to see to it that no building is erected within the prohibited space. It would seem, therefore, that the answer fails to show that the erection of the buildings within the ten feet line has caused any substantial injury to Mrs. Martin.

The evidence, however, took a somewhat wider range and I will discuss the case from the wider standpoint.

It appears that in 1887 Kate B. Carter purchased a tract of land having a frontage on Hillside avenue of about two hundred and eighty-five feet and a depth of two hundred and sixty feet. She conveyed lots on Hillside avenue, out of this tract, to different grantees, and in the several conveyances imposed, among others, the restriction above mentioned. In every instance of a conveyance of lots on Hillside avenue this restriction has been violated. All the lots have been built upon, and some part of each building is three or more feet over the line. The complainant's buildings are four feet and a fraction over it. All the buildings have been put up at least two years ago and some of them longer. The complainant erected hers two years and a half ago. If, therefore, Mrs. Carter had a general building scheme it has been disregarded, and, as far as appears, without objection on her part.

The question is whether under these circumstances the complainant is able to give a marketable title, that is, a title that will not expose the purchaser to the hazards of a litigation in regard to it. *Lippincott v. Wikoff*, 54 N. J. Eq. (9 Dick.) 107; *Fahy v. Cavanagh*, 59 N. J. Eq. (14 Dick.) 278; *Barger v. Gery*, 64 N. J. Eq. (19 Dick.) 263. The doubt about the title must be a rational doubt (*Barger v. Gery*, *supra*), or, as it has been otherwise characterized, "real, and not fanciful." *Methodist Episcopal Church v. Roberson*, 68 N. J. Eq. (2 Robb.) 433. There must, it is said, be some debatable grounds on which the objection to the title can be justified. *Vreeland v. Blauvelt*, 23

*N. J. Eq. (8 C. E. Gr.) 483.* Thus tested it would seem to be without substance. There is no doubtful question of law or fact present. The only conceivable litigation would be either an action at law for damages or a bill for mandatory injunction. The action at law could only be brought against complainant, for it was she, and she only, who broke the covenant. On a bill for mandatory injunction to protect restrictive building covenants, courts of equity have laid down two rules and applied them with much strictness: (1) the application must be promptly made (*Lippincott v. Wikoff, supra; Leaver v. Gorman, 67 Atl. Rep. 111; Sayers v. Collyer, 28 Ch. Div. 103*); (2) the common scheme of building must have been actually preserved. *Peek v. Matthews, L. R. 3 Eq. 515; Ocean City Assn. v. Headley, 62 N. J. Eq. (17 Dick.) 322.* Mrs. Carter would be met by both of these objections should she file a bill and, as far as I can see, they would be unanswerable. The case differs in an important particular from *Fahy v. Cavanagh, supra*, where Vice-Chancellor Pitney refused relief on the ground that the proof of a fact material to complainant's title, viz., the execution of a will defectively witnessed might be made difficult, if not impossible, by lapse of time. Here lapse of time would only make it still more difficult for Mrs. Carter to succeed. And if *she* could not succeed the case of the adjoining property owners is still more hopeless. Not only have they stood by while complainant was building, but they have themselves violated the same covenant. *Sutcliffe v. Eisele, 62 N. J. Eq. (17 Dick.) 222.*

I think, therefore, that the possibility of injury is so remote that it does not afford any just ground for refusing to perform the agreement.

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6 Buch.Jourdan v. Burstow.

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ROBERT JOURDAN

v.

WALTER BURSTOW et al.

[Decided October 14th, 1909.]

1. An agreement to convey property in satisfaction of an embezzlement, in consideration of a promise not to prosecute for the crime, is illegal.

2. Where property is conveyed in satisfaction of an embezzlement which has been committed, in consideration of a promise not to prosecute before the time, such property cannot be recovered back.

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*Mr. Henry Pomerehne*, for the complainant.

*Mr. Adrian Riker*, for the defendants.

STEVENS, V. C.

I have examined the authorities cited by complainant's counsel and such others as have been accessible, and I cannot find any precedent for a recovery such as is sought in this case. The decided weight of the evidence, so far as the facts are concerned, is with the defendants. It goes to sustain the charge of embezzlement and disproves the duress. The only question is the legal one: Whether a man who has actually conveyed property in satisfaction of an embezzlement, admitted to have been committed, can recover it back simply on the ground that the written agreement which he entered into with his employers to make restitution, contains a clause against prosecution. Such an agreement is plainly illegal, and its performance could not be compelled. But if actually performed the grantor suing to recover back his property stands in the same situation that the grantee would have stood in had he sued on the agreement. He is *in pari delicto* and the maxim is, "*in pari delicto, potior est conditio possidentis.*" In the note to *Collins v. Blantern*, 1 Sm. Lead. Cas. (6th Am. ed.) \*507, the rule is thus stated: "The

law will in general leave all who share in the guilt of an illegal or immoral transaction where it finds them and will neither lend its aid to enforce the contract while executory nor to rescind it and recover back the consideration when executed. The maxim '*nemo allegans suam turpitudinem audiendus*' applies in such cases with full force."

In *Meech v. Lee*, 82 Mich. 274, the case principally relied upon by complainant's counsel, and in *Williams v. Bayley*, L. R. I. II. L. 200, as well as in some other like cases, affirmative relief was indeed given, but those cases differ from that in hand in two important respects—*first*, the transaction was, in a certain sense, *in fieri*. The security had been given but the money had not been paid; *second*, the person asking relief was not the wrongdoer, under a legal and moral obligation to make restitution (*Smillie v. Smith*, 32 N. J. Eq. (5 Stew.) 51), but a third person who had, without any consideration moving to himself, and under an influence that was characterized as undue, undertaken the burden of the demand.

The case of *Haynes v. Rudd*, 33 N. Y. 251, reported again in 102 N. Y. 372, is very much in point. In an action to recover back moneys paid by plaintiff in payment of a promissory note given by him to defendant and transferred to a *bona fide* holder before maturity, the complaint alleged that it was given to compound a claim made by defendant that plaintiff's son had stolen money from him and that it was extorted by threats of public charges against that son. The case coming up on exceptions to the judge's charge, it was held that there could be no recovery if the agreement to compound the felony was part of the contract; that the parties were *in pari delicto*. Here the doctrine of *par delictum* was applied as against a third person. *A fortiori* must it be applied as against the alleged embezzler himself.

*Watson v. Murray*, 23 N. J. Eq. (8 C. E. Gr.) 257; *Gregory v. Wilson*, 36 N. J. Law (7 Vr.) 316, are cases which, while they differ in their circumstances from the present, illustrate the doctrine that the courts of this state will not help the plaintiff to recover money where the recovery is sought upon the footing of an agreement contrary to public policy. The bill should be dismissed, with costs.

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6 Buch.South Amboy v. Pennsylvania R. R. Co.

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THE MAYOR AND COMMON COUNCIL OF THE BOROUGH OF SOUTH  
AMBOY and THE BOARD OF CHOSEN FREEHOLDERS OF THE  
COUNTY OF MIDDLESEX

v.

THE PENNSYLVANIA RAILROAD COMPANY and THE UNITED  
NEW JERSEY RAILROAD AND CANAL COMPANY.

[Decided June 1st, 1909.]

1. Where a railroad company was required to maintain a proper passageway under its tracks at a crossing, a bill to compel the railroad company to enlarge such passage to provide for increased traffic, &c., must be regarded as a bill, not to abate a nuisance in a public highway or for the determination of easements, but as only invoking the chancery jurisdiction conferred by the General Railroad act (*P. L. 1903 p. 660 § 29*), providing that, when a railroad company shall not properly construct and maintain crossings of highways by its railroad tracks as required by law, the township or municipality may proceed in equity to compel specific performance of the duties imposed by law on the company in that respect, &c.

2. The extent of user ordinarily determines the minimum width of a highway; the extent of user not being limited, however, to the track formed by the wheels of vehicles.

3. Where the public acquires a right of travel over the land of another, the public easement includes the use of such adjacent lands as may be needed for ordinary repairs and improvements.

4. In order that a railroad "crossing" shall exist, the railroad and the highway must intersect each other in some degree, or at least one must be superimposed on the other.

5. The charter of a railroad company (*P. L. 1829-30 p. 88 § 15*) required it to construct and keep in repair good and sufficient bridges or passages over the railroad or roads where any public or other road shall cross the same, so that the passage of carriages, horses, and cattle on the roads shall not be prevented thereby, &c. General Railroad act (*P. L. 1903 p. 659 § 26*) makes it the duty of every railroad company to construct and keep in repair sufficient passages over, under, and across the company's right of way so that public travel shall not be impeded, &c., provided that section shall not enlarge the duty imposed by charter on any railroad incorporated prior to 1873.—*Held*, that section 26 did not enlarge the charter duties of the railroad company under which it was not required to construct an underneath crossing to the full width of the street, but was only required to construct a "passage" sufficiently large for the accommodation of the existing needs of the public.

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6. The legislature, in the exercise of police power, may increase the burdens on railway companies in respect to highway crossings.

7. Where a railroad was not constructed prior to April 21st, 1873, and its charter required it to construct and keep in repair sufficient bridges or passages over its railroad where any public or other road shall cross the same, the chancery court, in a statutory action authorized by the Railroad law (*P. L. 1903 p. 660 § 29*), had power to compel the company to construct a good and sufficient passage under its road for the accommodation of travel on a street with which the road had provided an inadequate undercrossing.

8. Where a railroad company's charter required it to construct good and sufficient bridges or passages "over" its railroad or roads where any public highway shall cross the same, the word "over" was used in its ordinary sense to mean "above."

9. Where a railroad company was required to construct and maintain an underpassage where a street crossed its right of way for a distance of two hundred and sixty-five feet covered by seventeen tracks, the railroad company was required to build and maintain a passage thirty-three feet wide and light the same either by suitable openings or artificial light, to pave the same to conform to the street, and to keep it properly drained.

10. Notice to a railroad company to construct and repair an underpassage or crossing is not a condition to the maintenance of a suit to compel specific performance of the company's duty to do so under Railroad law (*P. L. 1903 p. 660 § 29*), authorizing the township or municipality by suit in equity to compel specific performance of the duties imposed on the railroad company with reference thereto by law.

11. Under Railroad law (*P. L. 1903 p. 660 § 29*), authorizing the township or municipality to proceed in equity to compel specific performance of a railroad company's duty to construct and maintain proper crossings, the county was neither an improper nor unnecessary party complainant to a suit by the common council of a borough for such relief.

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Final hearing on bill, answer and proofs taken in open court.

*Mr. Frederic M. P. Pearse* and *Mr. George S. Silzer*, for the complainants.

*Mr. Alan H. Strong*, for the defendants.

STEVENSON, V. C.

The object of the bill is to effect a change of conditions of inconvenience and danger which are alleged to exist in the borough of South Amboy at that part of the public highway known as

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6 Buch.South Amboy v. Pennsylvania R. R. Co.

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Ridgefield avenue, where the railroad of the defendants crosses the same. The bill purports to exhibit the statutory equitable action to compel the specific performance of the duties imposed by law upon the defendants with respect to this crossing provided by section 29 of the General Railroad act of 1903. *P. L. 1903 p. 660.*

The important physical facts which constitute the grievances which the complainants assert on behalf of the traveling public are as follows:

The defendant the Pennsylvania Railroad Company, which is operating the railroad constructed under the charter of the Camden and Amboy Company, and its predecessors in title and possession, have gradually multiplied parallel tracks extending across Ridgefield avenue until there are seventeen in number, and the section of the highway covered over by these tracks has come to measure two hundred and sixty-five feet. The Camden and Amboy charter was passed in the year 1830 (*P. L. 1830 p. 83*), so that the first track must have been constructed at some time after that date. For a period following this first construction the proofs show that a passageway over the railroad was made and maintained by the operating company, which passageway was sufficiently wide to enable two vehicles going in opposite directions to pass each other at every point. At a later period, whether after raising the grade of the track of the railway company or not does not distinctly appear, the highway was passed through the embankment of the company and under the rails of its track. The railway company thereupon, at first, perhaps by means of timber, and soon afterwards, at any rate, by means of stone walls or abutments, carried its rails over the highway. The passageway thus provided for the public seems to have been reasonably sufficient for all the purposes of travel during that early period. I do not think that it is necessary to go back of this condition which was established and apparently accepted by the traveling public about fifty years ago or more. The stone walls were fourteen feet apart, and perhaps twenty-five or thirty feet in length. They encroached upon the highway to an extent hereinafter considered. The space between the rails was not planked over. There is no indication that the passageway was



inconvenient from lack of light or adequate drainage. The character of the adjacent lands and the infrequent use of the highway probably made the passageway amply sufficient for all the purposes of travel in that day.

One ancient witness testified that vehicles did not undertake to pass each other between these walls, but that the driver of a vehicle could readily look ahead through the passageway, and if two vehicles happened to meet at the passageway, which no doubt was an infrequent occurrence, one would wait for the other. From the condition of reasonable convenience and safety above described, a steady change in the direction of inconvenience and danger has been caused by the increase of travel on the road and by the operations of the railway company in widening its embankment and adding line after line of parallel tracks. The stone walls have been extended in order to sustain these lines of rails. When the walls had attained a considerable distance it appears to have become evident to the operators of the railway that some provision must be made for permitting vehicles to pass each other in what had become a tunnel. The railway company had not only extended the walls but had laid planking between the rails so that the highway passed through a rectangular tube of which the bottom apparently was the roadbed, the sides were the parallel stone walls, and the top consisted of the girders upon which the rails were laid and the planking which closed the intervening space. A turnout, therefore, was constructed, with a row of pillars or supports in the centre, the stone walls being made to recede from each other in a curved line. The stone walls, however, at the end of the turnout were brought together to about the same distance from each other as that which separated them at the start, viz., about fourteen feet. When the last tracks at the extreme southeasterly side of the right of way of the railroad company were laid, it seemed to be recognized by the operators of the railroad that an indefinite extension of this huge dark pipe through which the highway ran would not be advisable, and accordingly the side walls were made to recede, forming a flare. Along one side of the entire passageway runs a sidewalk two feet and five inches wide, leaving only eleven feet and seven inches for the roadway for vehicles.

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The grade of the highway when the railroad was constructed across it ascended toward the east from a point at or near the location of the first track or tracks. As the tracks were multiplied and the passageway or tunnel under them was extended toward the east, the grade of the highway was changed presumably because of the necessity for maintaining all the railroad tracks on substantially one plane or grade. The result was to lower the grade of the highway at least for a considerable distance under some, and probably many, of the more easterly tracks, and to make the ascent up a hill from the easterly end of the crossing more steep. There is direct testimony to this effect.

When the railroad track or tracks were first carried over the highway, it may be that the natural ancient grade of the highway was not in any way changed. It may also be that the girders or other supports upon which the rails were laid were high enough above the grade of the highway to afford sufficient headway for all sorts of vehicles which were customarily used in that locality. However this may be, the evidence, I think, establishes, beyond all question, that under the conditions which now exist and which may have been caused by the construction of these parallel railway tracks in recent times, the highway now has insufficient headway for the convenient passage of the higher kinds of vehicles.

It is unnecessary more particularly to describe the conditions at this crossing of the defendant's railway over Ridgefield avenue as they exist to-day. These conditions create a constant inconvenience and danger to the public, as has been amply proved. The passageway is so dark that the borough of South Amboy has assumed the burden of lighting the same with artificial lights. In times of heavy rains large quantities of water and sand are carried down into one of the open ends of the tunnel and render for a time the roadway impassable, there being apparently no provision for lateral drainage through the walls. After the water has sunk into the soil the sand remains obstructing the highway and the public authorities are put to expense in removing the same.

The theory of the bill is that the duty of changing these inconvenient and dangerous conditions is imposed by law upon the

defendant railway corporation, and that the court of chancery, in the exercise of the jurisdiction created by section 29 of the General Railroad act, can compel the specific performance of this duty.

It is admitted that by virtue of the consolidation which created the defendant, the United New Jersey Railroad and Canal Company, that company became charged with all the duties of the Camden and Amboy Company under its charter, and that by virtue of the lease of the United Railroad and Canal Company to the other defendant, the Pennsylvania Railroad Company, which lease was ratified by the legislature of New Jersey (*P. L. 1873 p. 1298*), the duties imposed on the United New Jersey Railroad and Canal Company with reference to the crossing of highways were charged upon the Pennsylvania Railroad Company. The lease which was thus ratified has not been put in evidence, but neither the answer nor the proofs show that the duties of the lessor company with respect to the crossing of Ridgefield avenue were transferred to the lessee company so as to relieve the lessor company therefrom. Under the pleadings and proofs the two defendants must be regarded as charged with all the duties with respect to this crossing which would be imposed upon the Camden and Amboy Company if that corporation were now operating this road under its charter.

The bill in this case, in my opinion, must be regarded as invoking only the jurisdiction conferred upon the court of chancery by section 29 of the General Railroad act. It is not a bill to have conflicting easements regulated or to have a nuisance in a public highway abated by an injunction. As the bill is framed and as the case has been tried the only proper decree in favor of the complainant must be a decree adjudging that the defendants have "not properly constructed and maintained" the "crossing" above described and directing the "specific performance of the duties imposed by law" upon the defendants "with respect to the construction, maintenance and repair" of said "crossing." Incidentally what is now a nuisance may be removed and the use of land subjected to conflicting easements may be in a measure regulated. A bill to abate a nuisance might accomplish its purpose and yet leave the most important duties of the defendants

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with respect to the highway crossing entirely undefined and unenforced. A bill to regulate conflicting easements might practically create new duties and exhibit a radically different cause of action from that which is vested in a township or municipality by section 29 of the General Railroad act. I think, therefore, that we may disregard the plausible arguments of counsel for the complainants, based upon the assumption that in this case the court of chancery may exercise its jurisdiction relating to nuisances or its jurisdiction to regulate under certain conditions the use of conflicting easements. The bill of complaint most amply exhibits the statutory action created by the above-cited statute, and that statutory action affords a complete remedy for all the grievances set forth in the bill.

1. The first question to be determined relates to the nature and legal status of this public highway known as Ridgefield avenue. The proofs show that prior to the construction of the first track of the Camden and Amboy Railroad Company this highway existed leading from South Amboy in a westerly direction through a sparsely settled territory and terminating at a certain dock or docks on the Raritan river. The road now leads to a bridge which has recently been erected across the river and forms a direct line of communication between Perth Amboy and South Amboy. Many buildings have been erected on the westerly side of the railway, where formerly there were open fields and unclosed lands. The volume of travel over Ridgefield avenue in consequence of these changes and improvements has very greatly increased.

An effort was made to show that a road was laid out in 1866, which coincided with Ridgefield avenue at this railway crossing, but I think the proof entirely failed. We have to deal with the highway as it existed by user or presumed dedication when the railroad tracks were constructed over it.

A large amount of testimony has been taken with a view to establishing the width of Ridgefield avenue. Counsel for complainants argue that the law establishes a presumption in the case of these ancient roads that they were laid out by virtue of some former statute and therefore must be deemed to be of the statutory width. The case cited to sustain this view is *Ward v. Folly*,

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5 N. J. Law (2 South.) 554, decided by the supreme court through Mr. Chief-Justice Kirkpatrick, in 1819. This case apparently has only been cited once, and then in a dissenting opinion filed by Mr. Justice Valentine in *Vantilburgh v. Shann* (1853), 24 N. J. Law (4 Zab.) 740, 748. The statutes regulating the laying out of roads are then cited under which Ridgefield avenue might have been anciently laid out, and the insistment is made that Ridgefield avenue must be deemed to be a laid road "not more than four nor less than two rods wide."

My impression is that the peculiar doctrine laid down in *Ward v. Folly*, which would seem to radically alter our law in regard to the origin of highways in use for more than twenty years, has been ignored, if not practically overruled, in some reported cases, and has been utterly disregarded in large numbers of civil and criminal cases tried at the circuits. Counsel for the defendants points out that Chief-Justice Kirkpatrick based his decision upon the ground that the road in question before him was traced back to a time prior to the year 1760, when no road books were required by law to be kept in the county clerk's office. It is argued that if the doctrine of *Ward v. Folly* is still sound law in New Jersey, it should be strictly confined to cases where the highway is shown to have been in existence at a time when no record was required by law to be kept of the proceedings by which it was laid. There is force, I think, in this argument. Certainly in this case Ridgefield avenue was not shown to have been in existence until many years after 1760.

I am not obliged under the view that I take of this present case to ascertain and establish anything more than the minimum width of Ridgefield avenue at this place of crossing. It is safer, it seems to me, to apply to the ascertainment of the minimum width of Ridgefield avenue the rule which has generally been recognized in England and throughout the United States according to which the extent of the user determines the width. 22 Am. & Eng. Encycl. L. (2d ed.) 1224; *Scheimer v. Price*, 65 Mich. 638; *Talmage v. Huntting*, 29 N. Y. 447; *People v. Judges, &c.*, 24 Wend. 491; *Morse v. Ranno*, 32 Vt. 600, 607; *Savings Bank v. Stockwell*, 84 Mich. 586; *Harlow v. Huniston*,

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6 Cow. 189; *Marchand v. Town of Maple Grove*, 48 Minn. 271; *Davis v. City of Clinton*, 58 Iowa 389.

The authorities agree that fences and fence lines often determine the width of a highway, but there is no proof in this case of the existence of fences defining the limits of Ridgefield avenue at this crossing-place when the railroad was constructed over sixty years ago.

The great weight of authority is opposed to the notion that the beaten track formed by the wheels of vehicles indicates the extent of the user in the case of these old country roads often called drift roads, which run through rough and unfenced lands. Vehicles pass over these roads sometimes at very long intervals. They seldom meet, but when they do meet, they may meet anywhere. The use of the road necessarily involves the passing of vehicles by each other, and the necessity for such passage may occur at any point. See *Hannum v. Inhabitants of Belchertown*, 36 Mass. 311, 312. When the public acquire such a right of travel and the landowners submit to the enjoyment of such right, the easement has been held to include the use of "such adjacent lands as may be needed for ordinary repairs and improvements." *Marchand v. Town of Maple Grove* (1892), 48 Minn. 271. The owners of lands who permit a highway to be established two or three miles or more in length must be presumed to know that at any time a change of conditions may occur such as actually happened in this case which will increase the use of the highway and multiply the number of vehicles passing hourly or daily over the same a hundred fold or more. The requirements for keeping the roadbed of Ridgefield avenue in proper condition for use today by the carriages and heavy automobiles and large furniture vans which now travel over it may be very different from the requirements of travel over the same highway seventy-five years ago, when the passage of two or three wagons per day may have measured the average use. Macadamizing the surface of the road may involve building it up and draining it by means of side ditches. The use of sufficient land on the side of the track for the purposes indicated, it seems to me, is plainly within the public easement acquired by dedication or user.

Without undertaking to discuss the mass of testimony given

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by ancient witnesses and presented by documents, I have reached the conclusion that Ridgefield avenue at this place of crossing must be deemed to have been in existence when the railroad was built with a width of at least two rods. It happens by accident that a consideration of the space necessary for two large loaded vehicles to conveniently pass each other with sufficient space on each side of the roadbed to secure its maintenance in good condition, has led me to just about this figure, thirty-three feet. The finding therefore has the very great advantage of being in accordance with the argument of counsel for the complainant based upon the doctrine of *Ward v. Folly*, and also of being sustained by some of the authorities which support a presumption that a road whose origin is in user or dedication has the "usual width" of the roads in the same locality. *Hull v. Richmond*, 2 Woodb. & M. 387; *Furniss v. Furniss*, 29 Pa. St. 15.

It may be that a close examination of the testimony would give support to the theory that Ridgefield avenue was established by user of a greater width than thirty-three feet on the easterly side of the original railroad track where the parallel lines of the track were constructed after the year 1885. This matter, however, may be left precisely as I have left the question of the applicability of the rule laid down in *Ward v. Folly*. The whole of the highway or the easterly portion of it may in fact be found to have a width of forty-nine and a half feet or of fifty feet, both of which dimensions have been referred to in the argument without affecting the character of the decree to be made in this case for a reason which will hereafter appear.

2. The next question involves the ascertainment of the duties which the defendants owe to the public, "with respect to the construction, maintenance and repair" of this crossing.

Counsel for the respective parties in this case agree that the doctrine laid down by Chancellor McGill, I think by way of *dictum* when the case is carefully analyzed, in the case of *Raritan Township v. Port Reading Co.*, 49 N. J. Eq. (4 Dick.) 11, applies to this case, and that the result is that when the width of the highway has been ascertained the defendants must span this entire width so as to leave the same entirely unobstructed. The view so expressed by Chancellor McGill cannot, I think, be

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deemed to have received support in the reference to it made by Mr. Chief-Justice Gummere, in the case of *Borough of Metuchen v. Pennsylvania Railroad Co.*, 73 N. J. Eq. (3 Buch.) 359. It certainly is a somewhat strange result of our law if, in case of the crossing at Metuchen, the Pennsylvania Railroad Company, in case they had built their embankment a few feet higher, would have been obliged to span the entire highway, which was sixty-six feet wide, whereas by keeping their rails a little lower and lowering the grade of the highway a span of forty-five feet was deemed adequate. If a railway crosses a highway in a deep cut fifty feet below the original level of the ground where the highway runs, the construction and maintenance of a bridge across the cut only half the width of the highway may be deemed a full performance of the statutory duty imposed upon the railway company. A railway which runs through a mountain in a tunnel does not "cross" the public roads which lie on the surface of the mountain a quarter of a mile perhaps above the railway tracks. In order to a case of "crossing" it seems to me the two things, the highway and the railroad, must intersect each other in some degree or at least one must be superimposed upon the other. In the present case the overlapping or intersection of the highway and the railroad is established beyond all doubt. The original public easement of travel over the surface of the road, as the road lay even after the first two railroad tracks had been constructed across it, has been interfered with, and to a large extent destroyed by the removal of earth and the consequent lowering of the grade of the road as track after track was constructed above and across it. If there was sufficient headway for the purposes of travel fifty or seventy-five years ago the proofs show that such is not the case to-day; that a large and high vehicle is liable to find a passage through the tunnel impossible. The natural drainage of the highway has been cut off by the extension of these apparently solid stone walls, while changes in the formation of the ground at and near the easterly end of the tunnel necessarily caused large quantities of water and sand at times to pass into the tunnel and obstruct the same. A suitable pavement for the roadbed which is reasonably necessary for the purposes of modern travel has not been supplied. Automobiles and other



heavy vehicles are left to struggle their way through the loose soil of the natural roadbed precisely as a farm wagon must have done several generations ago. The light necessary to the convenient use of the highway has been cut off by this extraordinary extension of walls and the tracks, girders and planking extending from one wall to the other.

We are not therefore dealing with a case the facts of which bring it within the operation of the rule laid down by Chancellor McGill in the *Port Reading Case*; we have in hand a case which, in my judgment, in every essential feature, is precisely the same as the *Metuchen Case*. The defendants have not built and do not maintain their railroad over Ridgefield avenue "so high above the level thereof as not to interfere with the public travel thereon" (71 N. J. Eq. (1 Buch.) 404; they are maintaining their railroad so as to make Ridgefield avenue cross the same—so as to make railroad and road "cross" each other; they have thus *taken* a large part of what the public enjoyed in the exercise of the public easement of travel over Ridgefield avenue, and hence the statutory duty rests upon them to provide a good and sufficient "passage" as a substitute for what they have taken. The area occupied by the railroad, *i. e.*, the structure, intersects the area which is subjected to the public easement of travel over Ridgefield avenue. What the defendants are obliged to provide is not a clear span over the whole of this highway which they are crossing, but the substitute provided by law. In other words, Ridgefield avenue does not exist under these railway tracks. What exists under the tracks is a "passage" which the defendants have undertaken to supply in performance of their statutory duty, and this passage is not in respect of the characteristics above indicated such a good and sufficient passage as the defendants are by law required to construct and maintain.

Counsel for the respective parties agree that the only statute which prescribes the duties of the defendants which this suit is brought to specifically enforce is section 15 of the charter of the Camden and Amboy Railway Company, which is as follows:

"That it shall be the duty of the said company to construct and keep in repair good and sufficient bridges or passages over the said railroad or roads where any public or other road shall cross the same; so that

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the passage of carriages, horses and cattle on said roads shall not be prevented thereby, and also where the said road shall intersect the farm or lands of any individual to provide and keep in repair suitable wagon-ways so that the owners and others may pass over the same." *P. L. 1830 p. 83 § 15.*

In my opinion, section 26 of the General Railroad act of 1903 also is applicable to this crossing and imposes duties with respect to it upon the defendants.

This section reads as follows:

"It shall be the duty of every railroad company owning, leasing or controlling any right of way for a railroad within this state, to construct and keep in repair good and sufficient bridges and passages over, under and across the railroad or right of way where any public or other road, street or avenue now or hereafter laid, shall cross the same, so that public travel on the said road shall not be impeded thereby, and said bridges and passages shall be of such width and character as shall be suitable to the locality in which the same are situated; and also where said railroad shall intersect any farm or land of any individual, to provide and keep in repair suitable and convenient wagon-ways over, under and across said railroad, and to construct and maintain suitable and proper cattle-guards at all road crossings; *provided*, that this section shall not enlarge the duty imposed by its charter upon any railroad company incorporated by special act and whose railroad was constructed before the second day of April, eighteen hundred and seventy-three."

It is settled law, I think, that it is competent for the legislature in the exercise of the police power of the state to increase the burdens upon railway companies in respect to highway crossings. *Morris and Essex Railroad Co. v. Orange*, 63 N. J. Law (34 Vr.) 252; *Cooley Const. Lim.* (6th ed.) 714, and cases cited; 22 *Am. & Eng. Encycl. L.* (2d ed.) 933, 934; 6 *Am. & Eng. Encycl. L.* 364.

The law, however, contains in the proviso a limitation which counsel for the defendants claims makes the whole section inapplicable to this particular crossing. I cannot adopt this view.

In the first place, section 26 does not, in my opinion, in the slightest degree, "enlarge" the duties imposed upon the defendants by the charter of the Camden and Amboy Railroad Company. The mandate that the bridge or passage "shall be of such width and character as shall be suitable to the locality in which

the same are situated," seems to be an accurate definition of the duty in respect of bridges and passages prescribed by section 15 of the Camden and Amboy charter. If such were not the case, however, the result would not be to render the whole section inapplicable to this case, but merely to save the defendants from being compelled to construct and keep in repair a more expensive passage under the new law than the one which they would be obliged to construct and keep in repair under the old law.

It certainly is no enlargement of the duties of the defendants to give them an option which they have under this new law to provide a good and sufficient passage for Ridgefield avenue either under, over or across their railroad, whereas under the Camden and Amboy charter, as counsel for the defendants most strenuously insists, the duty of the defendants is to maintain a suitable passage for Ridgefield avenue over this enormous barrier which the defendants have constructed and occupy with their tracks. Without undertaking to express any final opinion upon the matter, it seems to be apparent that the performance of the duty of the defendants under section 15 of the Camden and Amboy charter might require them to erect and maintain a lofty viaduct thirty or forty feet above the level of the ground on either side of the defendants' embankment and extending with suitable approaches for a distance of perhaps five or six hundred feet so as to span the entire seventeen tracks with the embankment upon which they are laid. The indications from the present volume of travel along Ridgefield avenue and the character of the defendants' use of its seventeen tracks are, that a grade crossing would be inadequate for reasons not only of convenience but safety.

In the second place, without construing the proviso of section 26 very strictly, which might be deemed proper in view of the character of this legislation, it seems clear that the railroad in its entirety was not "constructed before the second day of April, 1873." On the contrary, by far the greater part of this obstruction to travel, this "crossing" of Ridgefield avenue, was effected by the defendants when they multiplied their tracks for the purposes of their coal dumps about the year 1885 and thereafter. It is evident that it is impracticable to treat differently the por-

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tion of this immense barrier which was constructed prior to 1873 from the portion which was built after that date. There cannot be a passage under one portion and over the other.

Surely, it cannot be seriously argued that section 26 enlarges the duty imposed upon the defendants with respect to the maintenance of a suitable passage at the Ridgefield avenue crossing when it gives them an option to construct such passage under their railroad, if they should deem it more convenient and less expensive to provide such passage rather than the one over their railroad prescribed by their charter. Now, the defendants having, as their counsel argues, without warrant of law, provided a passage under their railroad in lieu of the passage over their railroad which their charter prescribed, have gone on for years maintaining this passage under their railroad after it had been legalized—after the new statute had given them the option to construct and maintain this very thing in discharge of their duty.

It seems to me that the true conclusion is that this court has full power in the statutory action prescribed by section 29 to compel the defendants to construct a good and sufficient passage under their railroad for the accommodation of travel on Ridgefield avenue for reasons above indicated, viz., (1) because the railroad, which makes the obstruction, was not constructed before April 2d, 1873, and (2) because the passage, which the decree in this case will prescribe, does not "enlarge" the duty imposed upon the defendants by section 15 of the Camden and Amboy charter. If there is any possible error in the view above set forth, the fact still remains that the defendants having full power to elect which of three kinds of passages they would construct and keep in repair at the Ridgefield avenue crossing, have for years elected to maintain in the discharge of that duty a passage under their tracks. They could not elect to maintain any passage under, over or across their railroad which was not "good and sufficient" within the meaning of their charter. The decree in this case will merely carry out what must be presumed to have been the election of the defendants and compel the defendants to perform specifically the very duty which they have elected to assume and discharge.

It must, I think, be conceded that counsel for the defendants is correct in his insistence that section 15 of the Camden and Amboy charter can be satisfied only by the maintenance of a passage for Ridgefield avenue *over* the railroad tracks so as to have the roadbed on the same grade as the railway track or at same convenient distance above it. The dictionaries, the decided cases and the verbiage of all the railroad charters and railroad laws which have been passed in New Jersey sustain this conclusion. The word "over," when used to describe or define the relation in space of one object to another, seems to have a definite meaning. 7 *New Eng. Dic.* 285; *Commonwealth v. Warwick*, 185 Pa. 623; *Central Vt. Co. v. Royalton*, 58 Vt. 234; *Illinois Central Railroad Co. v. Chicago*, 141 Ill. 586, 589, 599; *Newbury Port Turnpike Co. v. Eastern Railroad Co.*, 40 Mass. 326, 328; *Boston and Maine Railroad Co. v. City of Lawrence*, 84 Mass. 107, 109.

The Camden and Amboy charter was the first railroad charter passed in New Jersey, and the only models in this state which the draftsmen of the act had before them were the charters of canal companies where provision was made for bridges and where no underground passages for highways were taken into consideration for manifest reasons. The charters of the West Jersey Railroad and Transportation Company passed the next year after the Camden and Amboy charter (*P. L. 1831 p. 100 § 14*), and of the Delaware and Jobstown Rail or McAdamized Road Company passed in 1833 (*P. L. 1833 p. 80 § 10*), and the supplement to the Camden and Amboy charter passed in 1835 (*P. L. 1835 p. 58 § 2*), seem to exhibit the only other instances in which the word "over" alone is used in the section which deals with passages and bridges for highways. The attention of railroad men must have been very soon called to the fact that oftentimes it was more convenient for the railroad company and for the traveling public to have the passage for the highway constructed through an embankment and underneath the railway tracks. Accordingly, while section 15 of the Camden and Amboy charter was copied over and over again, instead of the word "over," we find the words "under and over," and "under or over," and in the

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General Railroad act above quoted, the phraseology is "over, under and across."

If the ingenious argument of counsel for the defendants should be accepted and the bill of complaint in this case should be dismissed, it would seem that a very extraordinary and disastrous consequence to the defendants might thereupon follow. They might be obliged to span the entire highway for the full width at every point which it might be found to have at such a height as to leave the entire easement of travel absolutely unaffected, and thus eliminate the "crossing" or to erect and maintain at great expense the enormous viaduct above referred to.

We now reach the question what at the present day, with the present requirements of public travel along Ridgefield avenue in view, must be the characteristics of a passage under the defendants' railroad which can be deemed "good and sufficient," so that public travel shall not be prevented or impeded. It is hardly necessary to point out that no distinction for the purposes of this case can be drawn between the preventing and impeding of travel. This lofty bank on which these seventeen tracks are constructed absolutely shuts off all travel until a passage of some kind is supplied. It is also unnecessary to speculate as to whether a passage could be deemed good and sufficient which would carry this tide of travel over these seventeen tracks upon the same grade. It may be presumed that the defendants will not urge that the decree should compel the substitution of the sort of a viaduct above described for any passage under the tracks which the decree could prescribe.

The following are the characteristics of the passage which the decree will compel the defendants to "construct and keep in repair:"

(1) The walls must be separated so as to leave thirty-three feet in the clear. No testimony has been taken and no argument has been addressed to the court in regard to the location of the middle line of Ridgefield avenue. As the evidence stands it will be presumed that the middle line is the middle line between the two walls. If such is not the case, or if for any reasons which have not been discussed the defendants may properly leave one wall standing and remove the other the required distance, further

testimony may be taken and the location of the passageway with reference to the centre line of the highway be established before the settlement of the decree.

At this point the reason for limiting the investigation of the width of Ridgefield avenue to what has been referred to as its minimum width may well be considered.

The exact question before the court in this case is not how wide is Ridgefield avenue at this place of crossing; the precise question is how wide a "passage" should the defendants be obliged to provide for use in connection with Ridgefield avenue. If there were grounds for questioning whether or not the defendants are spanning the entire highway so as to leave the public easement of travel unaffected and thus avoid any "crossing" within the meaning of our statute, it would then be necessary to determine the full width of Ridgefield avenue. It seems to me, as I have already intimated, that in such a case the railroad and the highway no more cross each other than when the railroad passes through a tunnel in the solid rock half a mile below the highway. To avoid a "crossing" and intersection or overlapping of easements or rights, the entire highway of course must be spanned. It does not, however, follow that there is no crossing where the railroad spans the entire highway with a stone tunnel a mile long which greatly interferes with the enjoyment of the public easement of travel by cutting off the light and subjecting the traveling public to inconvenience and danger from extraordinary artificial conditions thus created. With such a case, however, we have nothing now to do. The point to be indicated distinctly is that even if Ridgefield avenue was wider than thirty-three feet at the original place of crossing when the railroad was first built, and even if Ridgefield avenue was wider than thirty-three feet in 1885, in that portion where the additional tracks were then laid across it, the conclusion which I have reached is that a "passage" thirty-three feet wide is at present adequate as a substitute for the entire highway for use on the part of the public whatever the width of the highway at any point may be. The *Metuchen Case* here is a guide, and the remarks of Chief-Justice Gummere in relation to the width of the most

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crowded streets in New York and Philadelphia may well be referred to.

It should be borne in mind that the duty of the defendants is enlarged from month to month and year to year to meet all changes of conditions. *Central Railroad v. State*, 32 N. J. Law (3 Vr.) 221. The court cannot anticipate changes which may or may not occur. The court deals with the duty of the defendants to-day. It is for the defendants to consider whether or not it would be wise and prudent while taking down this immense structure and erecting another in its place to make it somewhat wider than thirty-three feet which width the court under present conditions deems adequate. The laying out of a wider highway, which may be done at any time, will raise a number of questions greatly affecting the liabilities of the defendants to the public which have not been considered in this case. The language of the Camden and Amboy charter is, "where any public or other road shall cross the same;" and the language of section 26 of the General Railroad act is, "where any public or other road, street or avenue now or hereafter laid shall cross the same." Comparing this phraseology with that employed in the charter of the Morris Canal and Banking Company, some of the questions relating to the liability of the defendants in case Ridgefield avenue should be widened will at once appear. See *Morris Canal Co. v. State*, 24 N. J. Law (4 Zab.) 62; *Paterson and Newark Railroad Co. v. Newark*, 61 N. J. Law (32 Vr.) 80.

There is no testimony in the cause which will enable the court to specify the height of the passage to be constructed—the headway which must be provided. Perhaps the evidence indicates that a slight increase in the headway either by the elevation of the tracks or the depression of the passage will meet all reasonable requirements. Additional testimony may be taken at the proper time in regard to this matter if it cannot be adjusted by agreement. There probably is a customary height for such passages which will practically control this case.

(2) The defendants must provide light for their passage; they have no right to block up the highway for two hundred and sixty-five feet and then provide for the accommodation of the traveling public a dark tunnel. The authorities of South Amboy



should be relieved from the duty which they have assumed of providing artificial light for this passage. Of course, whether the defendants provide suitable openings which sufficiently let in the daylight or maintain artificial lights may to some extent be left to their option. As the evidence now stands it would seem that the only practicable way of sufficiently lighting the passage is by artificial lights of some sort. This matter, however, may be left open for further suggestions.

(3) The defendants must suitably pave this passage. The case is on all fours in this respect with the *Metuchen Case*, and the decision of the court of errors and appeals is conclusive in regard to the matter. The defendants are required not to pave any portion of the highway, but to provide the passage which they have substituted for the highway with a suitable pavement or floor. No reason, I think, can be suggested why the passage should not be macadamized precisely as Ridgefield avenue is now macadamized.

(4) The defendants must provide for the draining of the water which flows into the passage or by proper means prevent the water from entering the passage. Defendants must also keep the passage free from the accumulation of sand. Many of these duties are summed up in the statement that the defendants must keep their passage in repair.

How far the decree in this case shall exactly define and prescribe in detail the things which the defendants are required to do in the specific performance of their statutory duty may be determined upon the settlement of the decree. It may be that a reference to a master to define accurately the improvements which the defendants are required to make will be found convenient. The defendants may desire to submit plans. If an appeal should be taken, it may be advisable to reserve the determination of details for a further hearing.

4. In addition to the matters hereinbefore considered counsel for the defendants interposes several objections to the granting of any relief to the complainants in this case, the most important of which may be briefly noticed.

It is argued that this action under section 29 of the General Railroad act cannot be maintained because no notice had been

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given to the defendants requiring them to construct and repair this passage or crossing. No such defence is raised in the answer, and if it had been, it is not sustained by the correct grammatical construction of section 29, and is also excluded by the express ruling of Chancellor Magie in the case of *Newark v. Erie Railroad Co.*, 72 N. J. Eq. (2 Buch.) 447.

It is also argued that the board of chosen freeholders of the county of Middlesex are misjoined as a party complainant. This objection is not raised in the answer, and being a mere technicality, not in the slightest degree affecting the administration of justice in this case, would not be entertained if it had any weight. In my opinion, the joinder of the county with the borough, under the circumstances of this case, is not open to objection by the defendants. The county by reason of its duties with respect to the paving of the highway has a concurrent interest with the borough in the ascertainment and the compulsory specific performance of the defendants' duties with respect to this crossing. The decree in this case makes some things of great importance to the county authorities *res adjudicata* as between them, the borough and the defendant railroad companies. While section 29 provides a new equity suit in favor of the "township or municipality," wherein the crossing in question is located, there is nothing in the statute which indicates that the suit thus to be brought is not to be governed in respect to the parties to it by the well-settled rules of equity practice and procedure. The county of Middlesex, under these well-settled rules, was, in my judgment, certainly a proper party, and perhaps even a necessary party, and plainly should be aligned as a party complainant rather than as a party defendant.

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MICHAEL WOLFSTERN and ABBIE WOLFSTERN

v.

THE PENNSYLVANIA RAILROAD VOLUNTARY RELIEF DEPARTMENT, THE PENNSYLVANIA RAILROAD COMPANY and MARY E. SOMERS, sometimes known as Mary E. Reilly.

[Decided August 31st. 1909.]

1. Though the scheme of a railroad company organizing an association for the benefit of its employes to establish a fund to pay death benefits is violative of the General Insurance law, it does not affect the contract between the railroad company and an employe, but the contract, in the absence of legislation on the subject, is enforceable.

2. Where the bill by the parents of a deceased member of a benefit association composed of the employes of a railroad company, organized by it for the establishment of death benefits, against the person designated by the employe as beneficiary, alleges that the object of the association was the establishment and management of a fund for the payment of death benefits, and sets forth only two of the regulations of the association and a part of a third, any doubts arising as to the legal or equitable rights of the parties, on account of the difficulty of discovering the terms of the contract because of the failure to set forth all the regulations, must be resolved in favor of defendant.

3. A railroad company organized an association for the establishment and management of a fund for the payment of accident, sick and death benefits. The dues payable by the employes of the railroad company were taken from their wages as a voluntary contribution. The railroad company agreed absolutely to pay the benefits according to the contract, in consideration of the payments made by the employes, whether such payments were sufficient or not.—*Held*, that the fund created, though deemed a trust fund for the benefit of the employes and their beneficiaries, could not be controlled by the employes, except possibly in equity to prevent a diversion of the fund or to secure an equitable distribution thereof on the winding up of the scheme.

4. A railroad company organized an association for the benefit of its employes, to establish a fund to pay accident, sick and death benefits. An employe desiring to become a member had to apply therefor and designate the beneficiary to whom the death benefit should be payable, and the beneficiary so named, on the approval of the superintendent, was entitled to the death benefit, provided good reasons were given for the designation. An employe applied for membership, and designated one as beneficiary whom he described to be his wife. The designation was

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approved.—*Held*, that the beneficiary so designated, though not the wife of the employe, was entitled to the death benefit as against the employe's parents.

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On motion to dismiss bill under rule 213.

*Mr. Maximilian T. Rosenberg*, for the motion

*Mr. J. Merritt Lane*, *contra*.

STEVENSON, V. C.

The question to be determined is whether the bill sets forth any equitable cause of action on behalf of the complainants. The first party named as defendant in the title of the cause is a mere bureau or department of the Pennsylvania Railroad Company. The bill was amended so as to strike out this supposed party. The actual contest in the cause is between the complainants on the one hand, and the defendant Mary E. Somers on the other. These parties are rival claimants to a death benefit (\$500), payable by the Pennsylvania Railroad Company on account of the decease of an employe. The complainants are the parents of the deceased employe; the defendant Mary E. Somers is the beneficiary designated by the employe and represented by him to be his wife.

The present motion is made solely on behalf of the defendant Mary E. Somers, and it does not yet appear that the Pennsylvania Railroad Company desires or intends to interpose any defence to the complainants' suit, or to contest its liability to pay the death benefit in dispute to one or the other of the two parties claiming the same.

The relations of the Voluntary Relief Department established by the Pennsylvania Railroad Company to the company itself and to the employes of the company who become members of this department, are disclosed to some extent in the opinion of Vice-Chancellor Bergen in the case of *Pennsylvania Railroad Co. v. Warren*, 69 N. J. Eq. (3 Robb.) 706. The scheme which seems to be a combination of a sick benefit society and a life insurance company, has been adopted by several of the larger railroads of the country. In some states the courts,

probably basing their decision upon views of the essential nature of insurance contracts and insurance business which do not obtain in this state, have held that this scheme in its entirety does not involve the prosecution of insurance business. *Donald v. C. B. and Q. R. R. Co.* (1895), 93 Iowa 284; 33 L. R. A. 492, 496; *Johnson v. Philadelphia and Reading Railroad Co.* (1894), 163 Pa. 127; 29 Atl. Rep. 854.

The law of New Jersey in regard to the character of business such as this relief department is organized to prosecute, may be ascertained from the following cases: *State v. Taylor* (1893), 56 N. J. Law (27 Vr.) 49; *S. C. affirmed, Id.* 715; *Goldenstar Fraternity v. Martin* (Court of Errors and Appeals, 1896), 59 N. J. Law (30 Vr.) 207; *Holland v. Supreme Council, &c.* (1892), 54 N. J. Law (25 Vr.) 490, 493; see note to *Penn Mutual Life Insurance Co. v. Mechanics Savings, &c., Co.*, 38 L. R. A. 1, 40; 1 Bac. Ben. Soc. & L. Ins. §§ 50, 51, 52.

No legislation in New Jersey has been cited which relieves the defendant corporation from the operation of our General Insurance law. *P. L. 1902 pp. 445, 446, §§ 88, 89.* Whether, in case the whole scheme of the relief department of the defendant corporation is violative of the letter and policy of our insurance laws, that fact can in any way affect the equities claimed by strangers to the contract between the defendant corporation and its employes, is a question which has not been raised in this case and will not be considered. Whatever may be the relation of this relief department to the insurance laws of the state, the contract with which we have to deal is plainly enforceable between the parties, and will be regarded as enforceable in this court at the suit and on behalf of any party for whose benefit the contract was made.

1. The contract in this case is in writing and consists of the application of the employe of the defendant corporation, the acceptance of the superintendent of the relief department, an officer of the corporation, and the regulations of the relief department approved by the board of directors of the defendant corporation.

The written application expressly refers to the regulations and incorporates them into the contract. While the bill alleges

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that the object of the relief department as expressed in the regulations is the establishment and management of a fund for the payment of accident and sick benefits to the employes of the Pennsylvania Railroad Company, and death benefits to "the relatives (of such employes) or other beneficiaries specified in the applications of such employes," only two of the regulations and a portion of a third are set forth. It may be that no more light would be thrown on this case if the entire book of regulations had been presented to the court in the bill of complaint, but if any doubts arise as to the legal or equitable rights of any of the parties to this suit on account of the difficulty of discovering the exact terms of the contract, the solution of such doubts, I think, must be in favor of the defendants. *Omnis presumptio contra proferentem.*

2. In this case we have to deal with contract relations pure and simple, unaffected by any special charter from the state, or any provisions of a statute regulating the creation and operations of benevolent associations, or *quasi* benevolent insurance departments of corporations. No legislation has been cited at the argument qualifying the above statement. This characteristic of the case before the court distinguishes it from numerous cases such as *Britton v. Supreme Council of the Royal Arcanum*, 46 N. J. Eq. (1 Dick.) 102; *Supreme Council, &c., v. Bennett*, 47 N. J. Eq. (2 Dick.) 39; *reversed, Id.* 563; *American Legion of Honor v. Perry*, 140 Mass. 590, 592; *Grand Lodge A. O. U. W. v. Connolly*, 58 N. J. Eq. (13 Dick.) 180. On account of this distinction these cases, and similar ones, in my opinion, are destitute of a large part of the force attributed to them by counsel for the complainant in his oral argument and brief.

3. While the Pennsylvania Railroad Company in this relief fund scheme offers to its employes the opportunity to enter into certain contract relations with the company, under which, in consideration of regular payments made by them, sick and accident benefits may be paid to themselves, and death benefits may be paid to their relatives and appointees, it does not appear that the employes of the company who enter into the offered contract with their employer become members of any fraternal organization or acquire any right to govern or control the operations of

the relief department, or the investment or expenditure of its moneys. The employees pay their stipend, which is taken from their wages as a "voluntary contribution," and in case the contributions of the employees with legacies, gifts and interest on investments shall not be sufficient to enable the company to make the payments called for by its contracts, the company itself supplies the deficit. Conceding that the funds of the relief department are held by the Pennsylvania Railroad Company as a trust fund for the benefit of the so-called members of the relief department, it seems to be a guaranteed trust fund. Beyond the possible right of the employees who make these contracts with their employer to come into a court of equity to prevent a misappropriation or diversion of the trust fund, or to secure its equitable distribution in case of the winding up or abandonment of the scheme, no right of the employees to intervene in the administration of the fund is apparent. The employer agrees absolutely to pay the sick, accident and death benefits according to the contract, in consideration of the payments made by the employees, whether those payments with any increase from interest or contributions from outsiders to the fund shall be sufficient for the purpose or not.

Conceding that the moneys contributed by the employees constitute a trust fund, the object of the trust is to enable the employer to carry out his contracts. No provision is made for distributing any possible surplus among the contracting employees or any other beneficiaries. If the regulations expressly provide for the distribution of such supposed surplus, no such provision is set forth in the bill. Inasmuch as the employer stands liable to supply any deficiency, it would seem that it has the right to appropriate any surplus. We may surmise that as a matter of fact the stipends which the employees are asked to pay and which are fixed by the employer, are as nearly as possible placed at a figure which will prevent the accumulation in the course of years of a large surplus to which the legal title, and, so far as appears in this case, the equitable title, would be vested in the employer. It seems to be entirely possible, however, that if large numbers of employees of the Pennsylvania Railroad Company should from time to time enter into this peculiar contract,

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and subsequently leave the employ of the company, a substantial surplus fund might be accumulated. It may be that a question can be raised whether there is or is not, strictly speaking, a fund held in trust by the Pennsylvania Railroad Company for the satisfaction of these contracts which it makes with its employees, but no such question has been raised in this case, and no such question will be considered. It will be assumed that a trust fund is exhibited in this case, out of which the payments which the Pennsylvania Railroad Company is absolutely bound to make under its contracts with its employees are primarily to be made.

4. The following are the important features of this relief fund scheme, which must be considered in determining the nature of the legal and equitable relations of the three parties to it, viz., (1) the employee (in this instance William Wolfstern) who sees fit to apply for "participation in the benefits of the relief fund," or, in other words, to apply to have the Pennsylvania Railroad Company enter into a prescribed contract with him; (2) the employer, the Pennsylvania Railroad Company, and (3) beneficiaries and possible beneficiaries who under the terms of the contract shall or may receive the death benefit.

(1) No employee has a right to be admitted into so-called membership of the relief department, or, in other words, to have his employer, the railroad company, enter into the prescribed contract, or any other contract with him. No employee can be elected to membership by his co-employees. The absolute right to *approve* the application in every case remains with the Pennsylvania Railroad Company. There are obvious reasons of policy which would prevent the railroad company from arbitrarily excluding any of its employees, *i. e.*, from arbitrarily declining to enter into the prescribed contract with such employee. All the legal and equitable rights, however, of all parties arise out of the written contract between the employee and his employer, the Pennsylvania Railroad Company, which each party is absolutely free to make or not as he sees fit.

(2) The applying employee must make his application in writing according to a prescribed form, which has a blank in which he "may designate" the beneficiary to whom upon his decease a death benefit shall be payable. The employee, however,



is not obliged to designate such beneficiary. The blank may remain unfilled if the superintendent of the relief department, the representative of the defendant corporation, sees fit to approve the application in that form.

(3) If no beneficiary is designated to receive the death benefit the same then is payable as prescribed in rule No. 29. In this instance, if William Wolfstern's application had not designated a beneficiary—if the blank had not been filled in—the death benefit payable under his contract would belong to his father and mother, the complainants in this suit.

(4) Rule 28 prescribes that

"the applicant *may* in his principal application, or subsequently in the prescribed form, designate a beneficiary or beneficiaries who shall upon the approval of the designation by the Superintendent of the Relief Department be entitled to receive his death benefit; provided that good and sufficient reasons must be given for such designation of other than relatives or legal representatives."

We find in this rule 28, taken in connection with rule 22, which is partly quoted in the bill of complaint, a somewhat singular series of concentric propositions.

(a) As we have seen, the opportunity of an employe to enter into a contract is, so far as legal obligations are concerned, absolutely within the will and discretion of the employer. There is nothing in this whole scheme as disclosed by the bill which obligates the Pennsylvania Railroad Company to make one of these contracts with any of its employes, and rule 22 expressly provides that the application, *i. e.*, the application as a whole, must be *approved* by the superintendent of the relief department. The absolute power to approve or not to approve of any application would seem to include the power to dictate the designation of the person or persons to receive the death benefit.

(b) The contract expressly provides that the designation of a person to receive a death benefit must in every case be approved by the superintendent of the relief department. This provision seems to have no legal force so far as the original application is concerned, for reasons which have been stated above. But the contract provides for the substitution of the beneficiary by others from time to time at the will of the member, and in regard to all

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such substitutes the rule requiring the designation to be approved by the superintendent is necessary in order to give the Pennsylvania Railroad Company through its officer, the superintendent, absolute control, the right to veto any change of beneficiary which the employe may desire to make.

The original designation of a beneficiary to receive a death benefit and the substitution at any time of any future beneficiary, is thus absolutely within the control of the Pennsylvania Railroad Company acting through its superintendent. The object of this provision seems to be apparent. It operates to protect the employe, and no doubt often to protect the duly designated beneficiaries of employes from unwise and improvident substitutions.

(c) When it is perceived that the original designation of a beneficiary is entirely subject to the approval of the superintendent of the relief department, and any substitution in like manner is subject to the approval of this officer, it is not quite clear what legal force can be given to the proviso to rule No. 28 above quoted, requiring "good and sufficient reasons" to be given for the designation of any beneficiary "other than relatives or legal representatives." This proviso in terms applies with equal force to an original designation and a substituted designation, and yet both the original designation and the substituted designation are in all cases subject to the approval of this same superintendent.

Let us assume, however, that the requirement of "good and sufficient reasons" has some legal force and effect. Let us suppose that in the case of relatives and legal representatives the superintendent is under a legal obligation to give his approval of a substituted beneficiary in the absence of reasonable objections. If such be the case then where the applicant designates as the beneficiary one who is not his relative or his executor or administrator, the superintendent cannot in any way or in any court be compelled to give his approval of the substitution merely because no reasonable objections are apparent; the superintendent may refuse to approve unless "good and sufficient reasons" are presented to him. It is not the absence of objections but the affirmative presentation of "good and sufficient

reasons" which entitles the employe to the approval of the superintendent. This rule is also applicable to the designation of a beneficiary when none was named in the original application.

Whether there is any practical value in the legal distinction above drawn, it is hardly worth while to consider. The object of the proviso is perfectly plain. The Pennsylvania Railroad Company does not propose to go into a general life insurance business with its employes. It does not hold itself out to them to issue policies on their lives payable to any person whom the assured may select. This life insurance business is carried on by the Pennsylvania Railroad Company with a limited class, viz., its employes, and practically for the benefit of another limited class who may be described generally as the relatives of the employes. This proviso to rule No. 28 distinctly notifies all employes of the company, who contemplate entering into this peculiar contract with their employer, and paying out their money for the advantages to be secured thereby, of the limitations controlled by their employer upon their power to designate a beneficiary who can receive the death benefit according to their contract.

5. Having in view the essential nature of the contract presented to this court by the complainants' bill, we now come to the facts of this particular case which give rise to the particular question to be answered. William Wolfstern, an employe of the company, now deceased, in his lifetime made his written application in due form for participation, &c., and this application was approved by the superintendent of the relief fund. The application named as the beneficiary to receive the death benefit, the defendant Mary E. Somers, who was described by Wolfstern as his wife. The claim of the complainants in this case may be summed up in the proposition that when William Wolfstern died there was then living no beneficiary designated by him with the approval of the superintendent of the relief department. It is insisted on behalf of the complainants that the formal approval of the superintendent of the designation of Mary E. Somers was nugatory and void on account of the fraud practiced by William Wolfstern upon the Pennsylvania Railroad Company. The alleged fraud consisted in the representation that Wolfstern made

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that the designated beneficiary was his wife, when in fact she was not his wife, but the wife of another man.

Wolfstern agreed in his application that "any untrue or fraudulent statement made" by him to "the medical examiner or any concealment of facts" in the application, should forfeit all rights and benefits with certain exceptions which need not be specified.

It may be that the express misrepresentation made by William Wolfstern in his application to the effect that Mary E. Somers was his wife should not be deemed a "concealment of facts." It is noticeable that the effect of untrue or fraudulent statements is only dealt with when such statements are made to the medical examiner. The common form employed in the prescribed application to many benefit societies appears to have been avoided in this case.

The complainants do not insist that by virtue of the above-quoted provisions any forfeiture was effected. Such a result would involve the failure of their entire case. The claim on behalf of the complainants is that the contract between William Wolfstern and the Pennsylvania Railroad Company is valid, but that it contains no valid designation of a beneficiary to receive the death benefit.

The complainants are not asking to have the contract between Wolfstern and his employer declared void on the ground of fraud. They have no standing in court to ask for any such decree—a decree which would destroy the basis of their claim. On the other hand, the Pennsylvania Railroad Company has not in any way by a cross-bill in this case, or otherwise, denied its liability to perform its contract according to its plain written terms.

I am unable to perceive any equitable right in the complainants to have any part of the written contract between William Wolfstern and the Pennsylvania Railroad Company to which they (the complainants) were entire strangers, set aside on account of fraud practiced by William Wolfstern upon the railroad company. This view, I think, is sustained by the opinion of the court of errors and appeals in the case of *Tepper*

v. *Supreme Council of the Royal Arcanum* (1900), 61 N. J. Eq. (16 Dick.) 638, 644.

The false representation made by Wolfstern to the effect that Mary E. Somers was his wife could not injure the other so-called members of the Pennsylvania Railroad Voluntary Relief Department. If Wolfstern had told the superintendent the truth in regard to the relations between himself and his proposed beneficiary, any one of various results might have followed. The superintendent might have regarded the selection of this particular beneficiary as an appropriate recognition of moral obligations resting upon Wolfstern, and with that view he might have approved Wolfstern's application and Wolfstern's designation therein contained. On the other hand, the superintendent might have declined to approve Wolfstern's designation, and thereupon Wolfstern might have declined to enter into the contract which called upon him to make periodical payments from his wages.

Assuming that the false representation made by Wolfstern which, it must be borne in mind, was in the original application at the very origin of the contract relations between Wolfstern and his employer, induced the superintendent to give his approval of the designation of a beneficiary, which approval otherwise he would have withheld, at any future time this superintendent or some other superintendent with knowledge of all the facts might have ratified the approval formerly given.

Without going into the question whether after the death of the employe it is competent for the Pennsylvania Railroad Company to set aside any part of this contract on the ground that the employe in his application made false statements, which were the basis of the approval by the superintendent of the employe's designation of a beneficiary to receive the death benefit, it seems to me that no advantage of any such false representation can be taken by any party other than the Pennsylvania Railroad Company. This railroad company is carrying on a life, health and accident insurance business, and its policy apparently is to prevent the scope of such business from extending beyond the limitations defined by the interests of its employes. It would be hard to establish a standard by which to determine what are good and sufficient reasons for approving the designa-

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tion of a beneficiary to receive a death benefit under one of these contracts. The judgment of the superintendent seems to be the only practicable test. If a designation, either original or substituted, once has received the approval of the superintendent, is it possible that the railroad company or anyone else could thereafter, at any time before or after the death of the member, allege that the designation was invalid because in fact the reasons given to the superintendent for the designation were not "good and sufficient?" It would open the door, I think, to litigation which should be discouraged if the action of the superintendent of the relief department in approving either an original or a substituted designation could be challenged by a stranger to the contract, either in the lifetime of the employe member or after his decease. All the provisions making it plain to the employes of the railroad company that the original designation of the persons to receive the death benefit, and especially all substituted designations, are subject to the approval of the superintendent, should, in my opinion, be construed in accordance with their evident purpose. They are, I think, honest notices, the object of which is to inform all the employes of the railroad company of the principles which would guide the employer in exercising its discretionary control over the designation of beneficiaries to receive death benefits. No employe could go into this insurance scheme in ignorance of the fact that the policy of the company is to confine the payment of death benefits, apart from exceptional cases, to relatives of the insured employes. The proviso to rule 28 above quoted, whatever its legal force may be, practically would tend to prevent disappointment, dissatisfaction and complaints.

We have seen that the complainants, in order to establish their right to this death benefit, must show that when Wolfstern died there was no beneficiary living whose designation had been approved by the superintendent. As a matter of fact there was such approved beneficiary, viz., the defendant Mary E. Somers. The designation, because of any fraud practiced by Wolfstern, was not void, but only voidable at most under well-settled rules of law.

6. I have endeavored to deal with this case as it was argued, assuming the case so argued to be precisely the case presented by

the bill of complaint. The argument has assumed that the false representation made by William Wolfstern procured the approval of the superintendent to the designation of the defendant Mary E. Somers as the person to receive the death benefit, and that if such false representation had not been made the superintendent would have declined to approve such designation. The exact allegation in regard to that matter is that if the superintendent "approved the designation of Mary E. Somers by the said William Wolfstern, it was approved by him under false and fraudulent representations, to wit, that the said Mary E. Somers was the wife of the said William Wolfstern." It does not follow from this proposition that if the exact truth had been told the superintendent would not have given his approval for reasons which he would have deemed "good and sufficient." Wolfstern may have preferred to make the false representation rather than to tell the whole truth, when either course would have been equally effective in procuring the desired approval.

The bill alleges on information that when Wolfstern made his false representation he "knew that he could not give any good and sufficient reason for the designation of said Mary E. Somers as his beneficiary," and further alleges on information "that no good or sufficient reasons were or could have been given" for such designation. Whether these propositions are to be regarded as relating to facts to be taken as true on this motion, which is equivalent to a demurrer, or mere speculations or opinions in regard to the probable action of the mind of the superintendent under certain conditions, is a question susceptible of considerable legal and metaphysical argument. If the defendant Mary E. Somers should file an answer joining issue on these propositions I think that the litigation thereby set in court would illustrate the impolicy of allowing these parties to attack this contract between Wolfstern and his employer upon the grounds set forth in this bill of complaint. The bill tenders as an issue to be tried the question whether in fact there were good and sufficient reasons for the action in the way of approval which the superintendent saw fit to take. The theory of the bill seems to be that the court of chancery in determining the controversy between these parties will adjudicate whether or not there were

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good and sufficient reasons for the approval of the designation of the defendant Mary E. Somers, and the goodness and the sufficiency of any alleged reasons must therefore be determined either by the judgment of the court or by the judgment which the court may conclude the superintendent would have made or ought to have made.

If the language of the proviso is to be taken literally, the important matter is not whether in fact there were good and sufficient reasons for approval, but whether such reasons were "given" presumably to the superintendent. If in such case Wolfstern might have stated good and sufficient reasons to the superintendent for the approval of his designation, but, from a motive of convenience, or delicacy, or pride, preferred to state a false reason, it would seem to be a strange result if the complainants on that account could now have this court declare such designation void. If in fact a good and sufficient reason existed the presumption is that the railroad company would, upon learning the truth, leave the original approval of its superintendent undisturbed or even expressly ratify the same.

A careful study of the objects and practical workings of this insurance department of the Pennsylvania Railroad Company, it seems to me, must greatly strengthen the conclusion that if after the death of an insured employe anyone has a right to defeat the payment to the beneficiary designated by the assured and approved by the superintendent, on account of any false representation made by the assured or false "reason" given by him to induce the superintendent to approve his designation, such right must be confined strictly to the Pennsylvania Railroad Company. Whether after the death of the assured employe it is competent for the railroad company to disavow or annul the approval of its superintendent, on the ground that such approval was obtained by fraud, is a question not raised in this case.

An order will be advised dismissing the bill as to the defendant Mary E. Somers, with costs.



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Hall Lace Co. v. Javes.

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76 Eq.

HALL LACE COMPANY

v.

LAWRENCE JAVES et al.

[Decided October 16th, 1909.]

1. The case of *Jersey City v. Cassidy*, 63 N. J. Eq. (18 Dick.) 759 was examined and followed in this suit.

2. Where the question is whether the restraint should be continued against the labor union defendant as well as against the body of its members, and the sole objection to the injunction is that it is unnecessary, and the objection is urged because of the erroneous notion that the vacation of the injunction is a "vindication" of the defendants, who have been subjected to its operation, comparatively slight evidence of the usefulness or necessity of the injunction is sufficient to sustain it until the final hearing.

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On motion for an injunction to restrain complainant's operatives and their labor union from causing complainant's employes to break their contracts of service and from preventing, by intimidation, &c., persons willing to be employed by complainant from entering into its service, &c.

*Mr. Thomas G. Haight*, for the motion.

*Mr. Pierre F. Cook*, contra.

STEVENSON, V. C.

In the above-stated cause I have not examined closely the terms of the restraining order, inasmuch as no criticism of them has been made by counsel for the defendants. The restraint seems to follow substantially the form prepared by me in the similar case of *Jersey City v. Cassidy*, 63 N. J. Eq. (18 Dick.) 759, a typographical error being corrected. The word "to," which is the first word in the second line on page 760, should be stricken out, and a comma inserted in place thereof.

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6 Buch.Hall Lace Co. v. Javes.

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It is conceded that the restraint may properly be continued against a large number of the individual defendants, in all fifteen, as my notes indicate. These men are members of the defendant union, The Chartered Society of Amalgamated Lace Operatives of America. The only question which remained for determination by the court at the conclusion of the last argument was whether the restraint should be continued against the union as well as against this substantial body of its members. I have re-examined the case, and especially the affidavits to which counsel particularly called my attention, and my conclusion is that there is enough of a case made out to make it proper that the injunction should stand against the union. This conclusion is reached with the principles in view which I have heretofore stated in *Jersey City v. Cassidy, supra*, and in other cases controlling the maintenance of an injunctive order in situations like the one now presented to the court. When defendants do not claim that the injunction restrains them from doing anything which they have a right to do, or which they desire to do—when the sole objection to the injunction is that it is unnecessary, and the objection is urged because of the erroneous notion that the vacation of the injunction is a “vindication” of the defendants, who have been subjected to its operation, comparatively slight evidence of the usefulness or necessity of the injunction is sufficient to sustain it until the final hearing. Even if the injunction should be dissolved the defendants are not “vindicated,” but stand charged with wrong-doing until the final hearing, when, if they are innocent, their “vindication” will come.

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Metropolitan Life Ins. Co. v. Hooppel.

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76 Eq.

## METROPOLITAN LIFE INSURANCE COMPANY

v.

JOHN HOOPPEL et al.

[Decided October 16th, 1909.]

1. The term "beneficiary," as used in insurance, means such person as should stand in the capacity of the beneficiary according to the established course of the insurance business of the company with its policyholders when the policy becomes payable.

2. The rule that, where a life insurance policy payable to a specified beneficiary had been in force for several years and the beneficiary is changed, the original beneficiary is entitled to receive from the proceeds the value of the policy at the time of the change, does not apply to industrial insurance.

3. An industrial policy and the application made a part thereof provided that the company would pay the person designated in the fifth condition therein set forth on receipt of proofs of death, &c., a stipulated sum. The fifth condition, however, did not contain a specification of the beneficiary, but only an enumeration of persons, to any one of whom the company might pay the sum stipulated in the discharge of its obligation, provided in support thereof the company could subsequently produce the policy and a receipt for the amount paid, signed by the party receiving it. The application, however, designated the insured's husband as beneficiary, and it was the company's custom to permit policyholders to change the beneficiary; it providing a printed blank for that purpose.—*Held*, that the original beneficiary designated in the application had no vested interest in the insurance during the life of the insured, and, she having changed the beneficiary in accordance with the company's custom and appointed another, the latter was entitled to the entire proceeds of the policy.

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Interpleader. On final hearing between contesting claimants to the fund.

*Mr. James Benny*, for the defendant John Hooppel.

*Mr. Andrew J. Steelman*, for the defendant Mary E. Cooling.

STEVENSON, V. C.

My conclusion in this case is that the fund should be answered to the defendant Mary E. Cooling.

1. The important facts are as follows:

The policy, which bears date May 21st, 1883, upon the life of the deceased, Mrs. Mary A. Hooppel, was issued by the Metropolitan Life Insurance Company to Mrs. Hooppel in pursuance of its scheme of industrial insurance. The contents of Mrs. Hooppel's written application for the policy, and of the policy itself, are sufficiently disclosed for the purposes of the present examination in the opinion of Mr. Justice Van Syckel in *Metropolitan Life Insurance Co. v. Schaffer* (1887), 50 N. J. Law (21 Vr.) 72. When this policy was issued the evidence shows that the company had established, and were maintaining, the custom of permitting their policyholders to substitute a beneficiary for the one named in the application. It provided a printed blank for the purpose entitled "Change of Beneficiary" to be executed by the holder of the policy, and duly witnessed. The inference is that in most cases the blank was filled out and witnessed by an officer of the insurance company. Mrs. Hooppel, in her application in 1883, in the proper blank named as the "person to whom benefit is to be paid" the defendant John Hooppel, whom she described as her husband. Unquestionably if Mrs. Hooppel had died while conditions remained unchanged, the defendant John Hooppel would have been the only person in existence who could plausibly claim to be the beneficiary. But on November 26th, 1888, an agent of the insurance company, at the request of Mrs. Hooppel, filled out one of the blank forms entitled "Change of Beneficiary" above mentioned, and the same was thereupon signed by Mrs. Hooppel and witnessed by the agent, and thereafter remained in the possession of the company until Mrs. Hooppel's death. By this instrument Mrs. Hooppel undertook to substitute her daughter, the defendant Mrs. Cooling, for her husband as "the beneficiary." The paper, in part, reads as follows:

"I do hereby request and authorize said company in the event of my death to pay over the proceeds of said policy to Mary E. Hooppel (now Mary E. Cooling) my daughter \* \* \* instead of the person or persons designated in the application for said policy."

The insurance company accepted this so-called "change of

beneficiary" and on the strength of it Mrs. Hooppel went on for years paying her premiums.

Mary A. Hooppel, the holder of the policy, with whom the insurance company made this contract, died January 16th, 1907, having until her death had possession of the policy, and thereupon the defendant John Hooppel, claiming to be the husband of the deceased, and also "the beneficiary" within the meaning of the contract of the insurance company, took possession of the policy and presented the same to the company with proofs of death and demanded payment. The insurance company finding the "Change of Beneficiary" on file, declined to pay. The defendants, the husband and daughter of the deceased, not being able to agree in regard to the payment of the money, this interpleader suit was instituted, and the fund, after deducting complainant's costs and counsel fee, which remains in court to be awarded to one or the other or both of these claimants, is less than \$300.

2. The contract of the insurance company in respect to the very vital question to whom the company is legally bound to pay the amount of the policy is singularly obscure. In the *Schaffer Case* above cited Mr. Justice Van Syckel states (at p. 74) that "there is no contract or agreement to pay to the beneficiary named in the application." The company in its policy agrees "to pay to the person or persons designated in Condition Fifth" therein set forth, upon receipt of proofs, &c., the stipulated sum. But when we turn to condition five we do not find a specification of the person or persons to whom the stipulated sum must be paid; we find only an enumeration of persons to any one of whom the company may, in discharge of its obligation, make a payment of the stipulated sum provided in support of such payment the company can subsequently produce the policy and a receipt for the amount paid, signed by the party who received the same. We find the contract of insurance in this case not only in the policy which Mrs. Hooppel received and kept in her possession, but also in the application for the policy signed by her and retained by the insurance company. The policy refers to the application and makes it "part of this contract." Notwithstanding the attempted wholesale incorpo-

ration in the policy of this complex paper, containing many words which do not import any contract obligation on the part of anybody, it may not follow that every proposition contained in the application must be deemed as a promise on the part of both of the contracting parties, or the one of them to whom the proposition can be attributed most naturally or plausibly, or with the least possible disregard of common sense. Taking the two clauses of the policy above referred to, viz., the express agreement of the company to pay, and the enumeration of persons to any one of whom a binding payment under conditions stated may be made by the company, in connection with the appointment of the beneficiary contained in the application, the result seems to be that the legal obligation of the company is either—

(1) To pay the amount of the policy to any member or member of any of the classes of persons named in condition five, or

(2) To pay such amount to "the beneficiary."

If the legal obligation of the company is to pay the amount of the policy to the beneficiary, then, carrying out the suggestion of Mr. Justice Van Syckel in the *Schaffer Case*, the terms of condition five, so far as they warrant payment to a relative or connection of the deceased, "operate as an appointment both by the assured and the beneficiary of persons, any of whom are authorized to receive payment of the sum agreed to be paid." This view seems to be more consistent than the other view above stated with the theory of the contract as a contract of life insurance, rather than a contract for a burial fund. It would be put to a test if a relative, not the beneficiary, should bring an action at law in his own name against the insurance company, and the company should defend on the ground that while the policy provided for paying the amount thereof to a relative, such relative merely acted under an appointment on behalf of the beneficiary, and that the beneficiary alone could sue at law in his own name. If by naming a party as the beneficiary in the application the assured merely adds an extra person to those enumerated in condition five to whom a binding payment under the conditions stated can be made by the company, the words employed are certainly inapt and misleading. The party so nominated in no

proper sense, especially having in view the common use of insurance terms, could be called "*the* beneficiary." The language of the application where the beneficiary is styled as the "person to whom benefit is to be paid" is also inappropriate. The description should not be of a person to whom the so-called benefit is to be paid, but of a person who by the appointment is merely added to the numbers of eligible persons to whom the company can make a binding payment under certain specified conditions, or rather make a payment which, under certain specified conditions, subsequently will be binding upon all parties concerned—all parties who were "lawfully entitled" to receive such payment.

Perhaps a third theory of the legal obligation of the insurance company under this peculiar contract is tenable, viz., that the company enters into a legal contract with every person coming within the enumeration of condition five which can be legally enforced by such person in an action at law, while the equitable title to the money, to whomsoever it may in fact be paid, is deemed to be vested in the beneficiary. One difficulty, perhaps insurmountable, in the way of this theory is perceived when it is considered that it permits "any relative by blood or connection by marriage," a brother-in-law, for instance, to maintain an action at law on the policy in his own name. The insurance company in the policy expressly agrees "to pay the person or persons designated" in condition five, the amount of the policy upon production of proofs of death. There is no requirement here that the person to whom the payment must be made must produce the policy. The company can discharge all its contract obligations by paying to any relative or connection by marriage, husband or wife of the deceased, the amount named in the policy, provided subsequently when such payment is challenged it can produce the policy and a receipt signed by the party to whom the payment was made, and who, of course, comes within the enumeration of condition five.

Perhaps also a legal theory of this insurance contract is tenable which makes it enforceable in an action at law brought by the beneficiary or his executor or administrator, or in the absence of any beneficiary by the executor or administrator of Mrs.

Hooppel, the party with whom the contract was made, while at all times and under all conditions the insurance company has the right under condition five to discharge itself from all liability to the party "lawfully entitled" by making payment in the manner therein prescribed. Such a theory would not permit a relative, husband or wife of the deceased, as such, to maintain an action at law for the amount of the insurance, although supported by a tender of the policy for surrender.

3. Whatever may be the true theory of the legal obligation of the insurance company and of the legal and equitable rights of "the beneficiary" under this insurance contract, the result so far as concerns the present case seems to me to be the same. The awarding of this fund to the defendant John Hooppel or to the defendant Mary E. Cooling, or of a portion of the fund to each of these two claimants, depends upon the true construction to be placed upon the term "the beneficiary" in the contract of the insurance company which is contained in the application and in the policy. The defendant John Hooppel makes no claim to this money as husband of the deceased, although it would seem that the insurance company, when he took the policy to its office and demanded payment, might have made a binding payment to him, taking from him a receipt which with the surrendered policy would protect such payment in the future from all attack. The defendant Mary E. Cooling makes no claim as daughter, although it would seem also that the insurance company after obtaining possession of the policy might have made a binding payment of the amount to her and insured the validity of such payment by filing her receipt for the same with the surrendered policy.

The sharp question is simply which of these two claimants must be deemed "the beneficiary" within the meaning of this contract of insurance. The contract of the company contained in the policy is not to pay a sum of money at the date of the contract, or at a specified date thereafter, it is a contract to pay to a certain person or certain persons a sum of money upon the death of Mrs. Mary A. Hooppel, which event would certainly occur at some time in the future, but might occur at any time during a long and undefined period. Payment at a future time



is contemplated by this contract, and such payment is provided for thereby. The contract is not to make actual physical payment to the beneficiary named in the application, as Mr. Justice Van Syckel points out. Such beneficiary might be dead. When we consider that when these words were employed and this future payment was contemplated and provided for, the insurance company had in full operation a system by which its policyholders from time to time changed their beneficiaries, it seems to me that according to a well-settled rule for the construction of contracts, and according to common sense the conclusion is inevitable that the term "the beneficiary" meant such person as should stand in the capacity of the beneficiary according to the established course of the insurance business of the company with its policyholders at the time in the future when the amount specified in the contract would become payable.

It is worth while to note that the "change of beneficiary" executed by Mrs. Hooppel did not undertake merely to appoint the daughter in the place of the husband as a person to whom a valid and binding payment might be made by the company, provided the company took her receipt and stood ready to produce the policy in support of its action in making such payment. The language is quite different from that employed in the application. The instrument positively instructs the company to pay the proceeds of the policy to the daughter. The paper seems to assume that the company had obligated itself theretofore to pay the amount of the policy to the husband who was named in the application as the beneficiary, and undertakes to substitute a new beneficiary to whom the proceeds of the policy are in any event to be paid.

4. We must now deal with the proposition that Mrs. Hooppel, the assured, was not capable under our law of substituting her daughter for her husband as the beneficiary in this policy. The law on this subject which has been very fully discussed by counsel is very far from settled. The authorities in different jurisdictions are conflicting. It seems to be conceded that the leading case in this state is *Landrum v. Knowles*, 22 N. J. Eq. (7 C. E. Gr.) 594. In my judgment, the law which interferes

with the right of two contracting parties to remodel, change or abolish their contract obligations as they see fit, merely because a third party, a stranger to the contract and its consideration, will be benefited by the performance of it in its original form, should not be extended. I think the decisions in New Jersey support this view. If the rule laid down in *Landrum v. Knowles*, and therein applied to the ordinary form of life policies where the beneficiary is named, and the insurance company promises to pay the stipulated sum to such beneficiary, is applied to this present case, it would be necessary to determine how to apportion this small sum of money between the original beneficiary, the defendant John Hooppel, and the substituted beneficiary, the defendant Mary E. Cooling. No surrender value of this policy has been proved, and the intimations are that it had no surrender value when the attempted substitution was made. The original beneficiary had the full value of this policy for five years. During that period in the event of the death of the assured, according to one of the views above expressed, he would have been equitably entitled to the amount of the policy no matter to whom the insurance company might actually pay the same in discharge of its entire liability. Whether there is any satisfactory and equitable way of apportioning the amount of this policy between these two successive beneficiaries, I shall not undertake to discuss, because, in my opinion, the rule laid down in *Landrum v. Knowles* must be confined to life policies where a definite beneficiary is named to whom the amount of the policy is expressly made payable, and ought not to be applied to these industrial contracts of insurance which are collected either by "the beneficiary," or an executor, or an administrator, husband or wife, or relative by blood or connection by marriage of the assured, and which are entered into by the parties while the insurance company is maintaining the custom of permitting its policyholders from time to time to change their appointment of the beneficiary originally made in their applications. I can see no final gift of the amount of the policy, or any portion of it to the person named as beneficiary in the application. The course of business with

reference to which this contract was made permitted a succession of beneficiaries. Contemplating this course of business, the nomination of John H. Hooppel as the beneficiary, does not indicate any absolute donative purpose on the part of the assured when she made her contract with the company. An essential element of a gift is conspicuously wanting. The only donative purpose which can be attributed to Mrs. Hooppel when she entered into this contract with the insurance company was to donate the amount of the policy in the event of her death, while the policy was in force, to her husband unless prior to her death she should make up her mind to donate that amount to some other beneficiary. It may be conceded, that, in analogy with some of these decisions, which give the third party a vested interest in a contract to which he is an utter stranger, a vested equitable interest might be established on behalf of the defendant John Hooppel which would give him some proportionate share of the amount of the policy. To recognize any such equity would, I think, require an extension of the law of judicial decision in a direction toward which it should not proceed, as I have already indicated, and might involve industrial insurance in difficulties which would impair its usefulness. The main object of a large proportion of these small industrial policies is to provide money not for the use of "the beneficiary" or other person who may be empowered to collect the same, but to pay the burial expenses of the deceased. This well-known fact sharply distinguished these industrial policies from ordinary life policies where the amount is intended to be paid to the beneficiary for his own use. The application to these little policies of the principle or theory that something is vested in "the beneficiary" while the policy stands payable, or possibly payable, to him—that some irrevocable gift has been made to him by the party who contracts with the insurance company and pays the entire consideration of the contract, would produce inconvenient results if the policy should remain outstanding as in this case over fourteen years, and during that period in order to accomplish the real purpose of the insurance three or four or more changes of beneficiary should be made. The difficulty

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of apportioning \$300 according to any equitable principle in a case like this among four or five different parties, including perhaps executors of deceased beneficiaries, is apparent. Whatever may be true in the case of ordinary life insurance policies or certificates of benefit societies, where the beneficiary is named and the amount of the insurance is intended to go to him for his own use, I fail to find in the case of this industrial insurance policy anything to indicate that Mrs. Hooppel at any time made a gift or conveyance of a "vested" right to her husband when she made her application and took out this policy. Mrs. Hooppel entered into this contract with the course of business of the insurance company in view, and that course of business, I think, determines the meaning of the phrase "the beneficiary," which was employed in the contract which she accepted from the company. There being no controlling decision on this subject, I am unwilling to recognize any equity on the part of the defendant John Hooppel which could prevent the assured and the insurance company, these two contracting parties, from changing the beneficiary who would be entitled to receive the entire amount of the policy as they might from time to time see fit.

5. The question has been argued in this case whether the law of New Jersey or the law of New York applies to this case. Each side of this question has been sustained by citation of authorities. I shall not undertake the determination of this matter because it has not been shown that the law of New York, as contained in statutes or the decisions of the courts, is in any degree different from the law of New Jersey upon any proposition which is controlling in this case.

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Sullivan v. Maroney.

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76 Eq.

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DENNIS J. SULLIVAN, next friend, &amp;c., et al.

v.

JOHN F. MARONEY et al.

[Decided June 11th, 1909.]

1. An assignment by insured of a life policy payable to her children, if they survived her, which they did, otherwise to her estate, was ineffectual against her children, who alone could assign their interest.

2. A life policy being made payable to certain beneficiaries, their interest can be divested in favor of other beneficiaries only in the manner provided by the policy for such a change; so that, the method provided by the policy for change of beneficiaries not being pursued in any respect, an instrument, in form simply an assignment, signed by insured, to whose estate the policy was payable only if her children, the beneficiaries, did not survive her, which was not the case, could not change the beneficiaries.

3. The rights of parties between themselves as to the proceeds of a life policy, depending on whether there was a change of beneficiaries, are not affected by the insurance company not contesting the question of change of beneficiary, but admitting its liability to some one.

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Heard on bill, answers, replications and proofs in open court.

This is a bill filed by the next friend of four infants to secure the proceeds of a life insurance policy.

The defendants are the life insurance company and those who claim adversely to the complainants. The life insurance company defaulted, and a decree *pro confesso* has been taken against it. The facts are stated in the opinion.

*Mr. J. Merritt Lane*, for the complainants.

*Mr. Mark A. Sullivan*, for the answering defendants.

GARRISON, V. C.

John F. Maroney was a life insurance agent doing business in Jersey City. Edward and Margaret Cahill, husband and

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wife, were people of the working class living in Jersey City. Marie Schaefer, subsequently married to McCabe, was a sister of Maroney's wife.

In January of 1906, Maroney induced the Cahills to take out \$12,000 worth of life insurance, \$6,000 on the life of each. These policies were as follows: On the life of Margaret, \$3,000 in the Equitable Insurance Company, payable to Edward; \$2,000 in the State Life Insurance Company of Indianapolis, payable to the four children of the parties (the complainants); \$1,000 in the State Life aforesaid, payable to Edward. On Edward's life, \$3,000 in the Equitable Insurance Company, payable to Margaret; \$2,000 in the State Life Insurance Company of Indianapolis, payable to Margaret; \$1,000 in the State Life aforesaid, payable to Margaret.

The premiums on all these policies, taken together for the first year, amounted to \$315. Maroney, who attended to all of the business, and acted as agent in the entire transaction, testifies that he secured the money to pay the premiums from Marie Schaefer (now McCabe) by an agreement between her and the Cahills, which was that she was to pay these premiums and was to have assigned to her all of the policies excepting the policy for \$1,000 on the life of Edward, payable to Margaret, issued by the State Life Insurance Company. He also says that she was to pay \$35 more than all of the premiums—that is to say, she was to pay \$350 instead of \$315, and that this extra \$35 was to go to Mrs. Cahill; and further, he says that it was agreed that she should pay all of the debts of Margaret Cahill which were owed by the latter at the time of her death; and further still, he said that, as part of the agreement, \$200 out of any insurance collected on the life of Margaret was to be paid to Edward. He asserts that he obtained the money to pay these premiums from Miss Schaefer shortly after the time that the policies were taken out in 1906, and that it was at that time that the agreement was made.

In January of 1907 Mrs. Cahill was seriously ill of the disease of which she died on the 2d of March, 1907, and while in bed she signed assignments of the policy in question, and at or about the same time Edward Cahill signed assignments to Marie

Schaefer of the \$3,000 policy in the Equitable Life and the \$1,000 policy in the State Life, on the life of Margaret, payable to him.

No assignments were ever procured from Margaret on the \$3,000 policy on Edward's life payable to her, issued by the Equitable, or of the \$2,000 policy in the State Life on the life of Edward, payable to her, nor of the \$1,000 policy in the State Life on the life of Edward, payable to Margaret. The last-named policy was not to be assigned, but was agreed to be kept up for the benefit of Margaret, according to Maroney's testimony.

This controversy concerns the \$2,000 policy in the State Life Insurance Company, of Indianapolis, Indiana, issued on the 16th of January, 1906, on the life of Margaret, payable to the four children.

Although Maroney and Schaefer each testify that the agreement was made and the premiums paid over by her to Maroney, and by Maroney to the company, in January or February of 1906, it is very difficult for me to believe this. I incline to the opinion that no payment was made to the company for the first year—probably Maroney's commissions were sufficient to at least satisfy the first year's premiums—and the fact, I believe, is that the first payment was actually made at the beginning of the second year, which was the time when the assignment was obtained.

Undoubtedly these policies were taken out by Maroney in a spirit of speculation. There is not the slightest pretence that the Cahills were ever in the position to take out any such amount of insurance, or to pay for any insurance at all out of their meagre means. At the time that the assignments were obtained from Margaret Cahill and from Edward Cahill, Margaret was a very sick woman, and was dying, and shortly afterwards died. It will be observed that assignments were only obtained for those policies which were upon her life—no assignments were obtained upon the policies upon the life of Edward.

Part of the agreement, Maroney says, was that the debts due by Margaret Cahill at her death should be paid by Miss Schaefer, as a portion of the consideration; and he also says that it was agreed that \$200 out of the insurance collected upon Margaret's

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death should go to Edward, her husband. It is inconceivable to me that any such agreements were made in January of 1906, when, so far as it appears, Margaret was in good health and there was no reason to suppose that she would either die soon, or would die before her husband.

However this may be, the taking out of the policies was a pure speculation, as was the participation therein of Miss Schaefer. As has been before stated, Margaret Cahill died on the 2d day of March, 1907, and the policy of \$3,000 on her life in the Equitable has been collected by Miss Schaefer, as has the \$1,000 policy in the State Life. It will be recalled that each of these policies on the life of Margaret were payable to Edward, and were by him assigned in January of 1907, by virtue of the alleged agreement of January, 1906, to Miss Schaefer.

The assignment of the policy in suit is in the following terms:

**"FORM OF ASSIGNMENT OTHERWISE THAN AS COLLATERAL SECURITY. To be attached to and retained with the policy for use as evidence when required.**

"For one dollar, to me in hand paid, and for other valuable consideration (the receipt of which is hereby acknowledged) I hereby assign, transfer and set over all my right, title and interest in Policy No. 149,191 on the life of (myself) Margaret Cahill issued by The State Life Insurance Company of Indianapolis, Indiana, and all money which may be payable under same to Marie Schaefer of Hoboken, N. J., whose P. O. address is 612 Washington Street, and for the consideration above expressed I do also for my executors and administrators guarantee the validity and sufficiency of the foregoing assignment to the above-mentioned assignee, her executors, administrators and assigns; and the title to the said policy will forever warrant and defend.

"In Witness Whereof, I have hereunto set my hand and seal, this 19th day of January, 1907.

"MARGARET CAHILL.

"EDWARD CAHILL."

The policy provisions which are material are in the following language:

"The State Life Insurance Company of Indianapolis, Indiana, hereby insures the life of Margaret Cahill, of Jersey City, State of New Jersey (hereinafter called the insured) and agrees to pay the sum of Two thousand dollars at the Home Office of the Company at Indianapolis, Indiana, to Dennis, Edward, Katie and William Cahill, her children, share and share alike (or to such other beneficiary or beneficiaries as may be



designated by the insured as hereinafter provided), if living, otherwise to the insured's executors, administrators or assigns, upon receipt and approval of proofs of the death of the insured, this Policy being then in force, less any indebtedness of the insured or beneficiary to the Company."

*"Assignment.* This Policy may be assigned upon written approval of the President, but the Company will not assume any responsibility for the validity of any assignment."

*"Change of Beneficiary.* The insured may, at any time during the continuance of this Policy, provided the Policy is not then assigned, and subject to the rules of this Company regarding assignments and beneficiaries, change the beneficiary or beneficiaries by written notice to the Company, at its head office; such change to take effect on the endorsement of the same on the Policy by the Company."

The bill sets out the issuance of the policy; the death of Margaret Cahill; the fact that the policy is in the possession of John Milton, who claims to hold the same on behalf of Marie Schaefer, now McCabe, and John F. Maroney; and that there has been no valid assignment or valid change of beneficiary which, in law, deprives the complainants (the four children named in the policies as beneficiaries) of their rights thereunder, and prays that it may be so adjudged.

The defence rests upon the assignment heretofore quoted.

It will be observed from a reading of the policy that the contract was, upon the death of Margaret Cahill, to pay the insurance money either to the four children, if they were living at the time of their mother's death, otherwise to the mother's executors, administrators or assigns.

There were, therefore, always two sets of interests in this policy—the beneficiaries (who would get the money if they were living at the death of the insured), and the representatives of the insured (to whom the money would come if the insured outlived the beneficiaries). Each of these interests was undoubtedly subject to assignment. Neither one could, in my view, assign anything excepting that which would come to that one; and the assignment of neither could possibly impinge upon the rights of the other. In other words, the beneficiaries, if of age, could undoubtedly assign their interests under the policy, and the insured could undoubtedly, as against her estate and so as to bind it, assign that interest—i. e., the interest which would come to her estate.

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It is provided that the policy may be assigned upon written approval of the president, and it is claimed by the complainants that this assignment was not approved in writing by the president, and this is so. It might be material to determine this question if it affected any issue in the suit, but in my view it does not. It is not necessary for me to determine whether this assignment would be effectual against the personal representatives of Margaret Cahill, because in the present juncture they have no interest. The four children outlived their mother, and, therefore, are entitled to the proceeds of the policy as against the representatives of the mother, or anyone to whom the rights of such representatives had been assigned. It is, therefore, immaterial to determine whether this assignment should be recognized in default of the written approval of the president of the company, because, whether recognized or not, it does not affect the issue.

The authorities are numerous—and, with the exception of Wisconsin, unanimous—that in an ordinary life policy the interest of the beneficiary is vested and cannot be divested by an assignment of the policy by the insured. 49 L. R. A. 737.

It seems perfectly plain, upon principle, that where the contract of A is to pay B upon the death of C, that C may not, by any assignment of that contract, cause the money due thereunder to be paid to anybody but B, or B's assignee. And so the cases hold. See the cases in the notes last cited at p. 740; to which add *Cyrenius v. Mutual Life Insurance Co.*, 145 N. Y. 577; and a statement to the same effect in *Golden Star Fraternity v. Martin* (Court of Errors and Appeals, 1896), 59 N. J. Law (30 Vr.) 216.

The contention of the defendants, however, is that this assignment must be treated as if it effected a change of beneficiaries, and substituted in the place of the four children (the beneficiaries named in the policy) Marie Schaefer (the person named in the assignment).

I cannot accede to this argument, and, in fact, do not think that there is anything to support it. The paper, in form, is an assignment. It is made by a person who has an assignable interest, and carries that interest. The interest, as has been pointed

out, was contingent but assignable. It does not purport in any way to make a change of beneficiaries, or to affect their interests. The method of change of beneficiary is pointed out in the contract, and that method was not pursued in any respect. It is not even attempted to be shown that it was effected according to the rules of the company, as required, or that any written notice thereof was given to the company, or that it took effect by endorsement on the policy of the company, all of which are requisites.

I think it entirely clear from the authorities that where a contract of insurance is made payable to certain beneficiaries their interests therein can only be divested in favor of other beneficiaries by changing the contract in the manner in which the contract points out that it must be changed to effect that result. *American Legion of Honor v. Smith* (Vice-Chancellor Van Fleet, 1889), 45 N. J. Eq. (18 Stew.) 472; *Travelers' Insurance Co. v. Grant* (Vice-Chancellor Pitney, 1896), 54 N. J. Eq. (9 Dick.) 217; *A. O. U. W. of New Jersey v. Gandy* (Vice-Chancellor Grey, 1902), 63 N. J. Eq. (18 Dick.) 692; *Pennsylvania Railroad Co. v. Warren* (Vice-Chancellor Bergen, 1905), 69 N. J. Eq. (3 Robb.) 706.

And I do not find that there is anything in the contention of the defendants that the company, by not contesting the question concerning the change of beneficiaries, has altered in any way the rights of the parties as between themselves. If the provisions required by the contract, or by the charter, constitution, by-laws or statute laws regulating a beneficial order, which make part of their contracts, have not been complied with, the change has not taken place—the properly named beneficiaries have not been displaced; and the fact that the company, or the order, pays the money into court, or admits its liability to pay, cannot affect the question. The question always remains, who are the beneficiaries—and they must be named in accordance with the contract, including therein, of course, that which is held to be part of the contract in the cases where the whole contract is not comprised in one paper, certificate or policy.

This is directly decided in our own court (*A. O. U. W. of New Jersey v. Gandy*, *supra*, and *Pennsylvania Railroad Co. v. War-*

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*ren, supra*), and is in accordance with sound reasoning and other authorities. *Freund v. Freund*, 218 Ill. 189; 75 N. E. Rep. 925; *Sangunitto v. Goldey*, 84 N. Y. Supp. 989; 25 Cyc. 893, 894.

Equities, of course, may arise which prevent the application of the normal rule. (For such an instance see *Supreme Council Catholic Benevolent Legion v. Murphy* (Vice-Chancellor Pitney, 1903), 65 N. J. Eq. (20 Dick.) 60.) But they emphasize and do not weaken the rule.

The righteousness of the decision thus far announced would seem to me to be undoubted, were it not for the opinion in the case of *Landrum v. Knowles* (Court of Errors and Appeals, 1871), 22 N. J. Eq. (7 C. E. Gr.) 594, and the construction that may have been, or may seem to have been, placed upon it in the following cases: *De Ronge v. Elliott* (Vice-Chancellor Dodd, 1873), 23 N. J. Eq. (8 C. E. Gr.) 493; *Brown v. Murray* (Vice-Chancellor Stevens, 1896), 54 N. J. Eq. (9 Dick.) 596; *Locomotive Eng. Association v. Winterstein* (Vice-Chancellor Reed, 1899), 58 N. J. Eq. (13 Dick.) 198; *Spengler v. Spengler* (Vice-Chancellor Stevens, 1903), 65 N. J. Eq. (20 Dick.) 178.

It becomes necessary, therefore, to carefully consider the case of *Landrum v. Knowles*, and I have taken occasion to get excerpts from the original papers and briefs so as to get at the very point decided.

The policy in that case recited that in consideration of the premium paid by Lucy A. Landrum and of the annual premium to be paid thereafter, they did assure the life of Samuel Landrum, her husband, in the amount of two thousand dollars,

"for the sole use of the children of the said Lucy and Samuel \* \* \* And the said Company do hereby promise and agree to and with the said assured, their assigns, well and truly to pay or cause to be paid the said sum insured to the said assured, their assigns \* \* \* at the death of Samuel."

It recites that the policy is accepted "by the assured" upon certain conditions. It is further recited that "in case the said Lucy A. Landrum shall not pay the said annual premiums \* \* \* the said company shall not be liable to the payment of the sum insured." It is recited in the policy "if assigned, notice

to be given the company, and the party to whom the policy is transferred must sign all premium notes with the assured."

It is quite evident from the reading of this policy that Lucy A. Landrum was the assured; and with this in mind, I think we can clearly understand the opinion of the court of errors and appeals, and clearly see that it does not apply to a different kind of insurance contract, and does not run counter to the well-nigh unanimous decisions regarding assignments of policies made payable to beneficiaries. The policy was taken out in 1850. In 1860 Lucy Landrum, with the assent of her husband, assigned this policy to Knowles in payment of debts due to him by her husband. Lucy paid the premiums due on the policy up to 1860. Knowles paid the premiums afterwards for nine years, when Landrum died. The chancellor decreed that the children were entitled "to the cash value of the policy of insurance in question \* \* \* at the time the policy ceased to be kept alive by the payment of the premiums by Lucy A. Landrum \* \* \*" and that the balance of the money owing on the policy was to be paid to Knowles. This was affirmed by the court of errors and appeals upon the theory that, from the facts, it was evident that Mrs. Landrum, the assured, took out this policy upon the life of her husband, payable to herself, for the use of her children as a gift to the children, and that so long as she kept up the payments she was continuing to increase, so to speak, or keep alive, the gift to the children; but that when she assigned this policy, in which she was the assured, she thereby indicated her intention no longer to continue the gift, and only so much would be allotted to the children as had then been given—that is, the cash surrender value of the policy at that time.

Many, if not all, of the cases which comment upon this case of *Landrum v. Knowles* make the mistake of supposing that the money was payable to the children, and the chief-justice, himself, in his opinion, makes this mistake. The policy plainly shows that the money was not to be paid to the children, but was to be paid to "Lucy A. Landrum, the assured." The policy recites that it is for the sole benefit of the children, and much, if not all, of the reasoning of the case revolves around this difference. Lucy A. Landrum having taken out a policy in which

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6 Buch.Sullivan v. Maroney.

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she is the assured, and which provides that the money is to be paid to her, as the assured, has it stated in the policy that it is for the benefit of her children. It may well be that one who is thus constituting one's self a voluntary trustee will only be held to be trustee to the extent that the gift is effectuated; but the reasoning which would apply to such a situation would not apply to a case where the policy was payable to the beneficiaries. In such a case, as has been before pointed out, no assignment by anyone excepting the beneficiaries can affect their interest, and their interest can only be changed by the substitution of new beneficiaries in accordance with the terms of the contract or the laws of the order, if it be a beneficial order.

There was no point in the brief for the children in the *Landrum Case* that this policy was, as against them, not assignable—in fact, in counsel's third point he concedes unquestionably that it was assignable. The point he made was that the assignee stood in the place of the assignor as trustee for the children. However this may be, I am clear that the decision in *Landrum v. Knowles* should not be held to extend any further than the exact facts comprised in it. If we confine that case to the right of a person to whom the money is to be paid—the assured, in other words—to assign that interest, we are at liberty to place New Jersey in harmony with all other jurisdictions, so far as I know, excepting Wisconsin, in the holding that an assignment of an insurance policy made payable to beneficiaries by any other persons than the beneficiaries cannot affect their interests.

That this is the proper holding seems to me to be beyond dispute.

The complainant makes the further contention that Marie Schaefer had no insurable interest in the life of Margaret Cahill, and that, therefore, the assignment is void. In other jurisdictions there is authority for this contention, and a very strong argument can be made that such, under the authorities, should be the law of New Jersey; but I find it unnecessary to consider or decide this question because of my opinion with respect to the other points involved, which is dispositive of the case.

In conclusion, I find that the assignment, if considered good, notwithstanding that it was not upon "the written approval of

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the president," carries only the interest which the assignor had, and that was the interest, as against her own estate, to receive the payment if she outlived her children. That assignment was not in any sense a change of beneficiary, and cannot be so considered.

Since the insurance company has, by not answering, and by the effect of the decree *pro confesso*, admitted it owes the money, the decree should provide for the payment of that money to the complainants, with costs against the answering defendants.

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MICHAEL KIERNAN et al.

v.

THE MAYOR AND ALDERMEN OF JERSEY CITY and HENRY  
BYRNE.

[Decided June 10th, 1909.]

1. Equity has jurisdiction to protect and enforce legal rights in real estate, which defendants deny, if the court finds that the right exists and that complainant has not an adequate remedy at law or the threatened damage is irreparable.

2. Where complainants claimed title to land which defendant city alleged was a duly dedicated street, they could not maintain a suit to enjoin defendants from laying sewer pipe in the street, complainant's remedy by ejectment being adequate and the damages not being irreparable.

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Application for preliminary injunction. Heard on bill and proofs, and answer and proofs.

*Messrs. Collins & Corbin*, for the complainants.

*Mr. Warren Dixon*, corporation counsel, for the mayor and aldermen of Jersey City, defendants.

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6 Buch.Kiernan v. Jersey City.

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GARRISON, V. C.

This is a bill to restrain the defendants from laying sewer pipe through certain lands.

In 1854, one Brinkerhoff was the owner of certain lands in Jersey City. He conveyed to one Kiernan. Kiernan sold to S. W. and Joel I. Hoyt, who gave to him a mortgage dated the 12th of February, 1868. Kiernan, on the 23d of September, 1880, began a foreclosure suit on this mortgage, and on the 8th of August, 1881, purchased the property at sheriff's sale under the foreclosure decree.

Kiernan died, and his wife, by will, became the owner of the property, and upon her death her heirs-at-law succeeded to her rights and are the present complainants.

The projected line of sewer pipe runs through a portion of the land above mentioned.

The complainants seek an injunction to prevent the pipe from being laid as projected.

The city claims that the projected line of pipe runs through a portion of the lands which had been dedicated to the city under the name of York street. It shows by its proofs that about 1855 a plot of the lands in question was made showing York street, and that this map was filed in October of 1868; that in 1874, S. W. and J. I. Hoyt, the owners of the property, filed another map thereof also showing York street. The complainants contend, with respect to the first map, that it was made after Kiernan purchased from Brinkerhoff and was not made by Kiernan, and therefore does not bind him; that as to the second map, it was made by the Hoyts while they were owners, but subsequent to the time that they had mortgaged the same to Kiernan, and that the mortgage was subsisting and unpaid at the time of the dedication. They therefore claim that, as to them, the dedication is ineffectual, which is so, if they have not, by acquiescence or ratification, shown an intention to join in the dedication, or so conducted themselves as to be bound by it.

To this the city responds that in the foreclosure of the mortgage, which the Hoyts had given to Kiernan, the latter made Jersey City a party, and, in the bill, recites many conveyances



made by the Hoyts in which York street, as shown on the map aforesaid, is mentioned, and that the map aforesaid is constantly mentioned in the bill of complaint in describing mortgages and deeds; and, further, that in the said bill of complaint, Kiernan charges that the city, on or about the 16th of April, 1870, took proceedings for the opening of Corneliuson avenue, describing the land purported to be covered by Corneliuson avenue, and naming "York street as proposed" as one of the stations, and charges that the said land included in the said proceedings with respect to Corneliuson avenue was a portion of the land included in the mortgage, and that the mortgagee has not released or discharged any portion of the said mortgaged premises; and, further, that by virtue of the proceedings the city claims to have some claim to the land above described, namely, the land included in the proposed Corneliuson avenue; but the complainants charge that the city, if it has any claim, has it subsequent to the mortgage aforesaid.

It will be observed in passing that the proceedings which the city took were in 1870, and were, therefore, prior to the dedication map made by the Hoyts in 1874.

The city contends that Kiernan, the mortgagee, by this bill, discloses that he had complete knowledge of the Hoyt dedication map of 1874, and, by specifically charging, as against the city, a lien only with respect to Corneliuson avenue under proceedings begun before the Hoyt map acquiesced in or ratified the dedication of "York street as proposed" on the Hoyt map; that, by only challenging such rights as the city claimed in proceedings begun before the Hoyt map was filed, the complainants showed an intention to acquiesce in and ratify the dedication of the streets as shown on the Hoyt map. There is no charge in the bill challenging the city's right to the streets shown on the Hoyt map.

The effect of the foreclosure and of the recitals of the bill, &c., is differently construed by the complainants.

The city further shows, by its proofs, that on an official assessment map made in 1894, this property appears with York street delineated as on the earlier Hoyt map, and that since that date (1894) the lands have been assessed to the owners on

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Kiernan v. Jersey City.

each side of York street—that is, the lands were divided into two plots, one on each side of York street, and York street was recognized in the tax assessments as a street and not assessed for. It further shows that the owners, seeking a reduction of these taxes, had them referred to the Martin act commissioners, which, the city claims, was a further recognition by the owners of the existence of the street.

It will be seen from the foregoing that the question is whether the city has a legal right to treat the land in question as a street and place sewer pipes under the soil thereof. The city contends that it has; the complainants, that it has not.

The contest is purely over a legal right. The complainants contend that their legal right, though formally disputed, is yet clear on facts which are not denied and legal rules which are well settled; and, therefore, this court should protect and enforce it.

It is true that this court has jurisdiction, under certain circumstances, to protect and enforce legal rights in real estate; and that it will, in such cases, exercise its jurisdiction, notwithstanding that the defendants may raise a question as to the legal right of the complainant, if the court finds, upon the facts and the law, that the complainant has the legal right he asserts and that it is a proper case for the interposition of equity. *Hart v. Leonard* (Court of Errors and Appeals, 1886), 42 N. J. Eq. (15 Stew.) 416.

But the cases and circumstances in which this jurisdiction is exercised are those in which the remedy at law is inadequate or the threatened damage is irreparable. *Delaware, Lackawanna and Western Railroad Co. v. Breckenridge* (Vice-Chancellor Emery, 1896), 55 N. J. Eq. (10 Dick.) 141; affirmed, *Id.* 593; *New Jersey Junction Railroad Co. v. Woodward* (Chancellor Magie, 1900), 61 N. J. Eq. (16 Dick.) 1.

I do not stop to consider whether certain of the classes of cases set forth in *Hart v. Leonard* are examples of or exceptions to the rule; they are cases where one, under color of statutory right, attempts to appropriate the land of another without complying with the conditions precedent, cases to stay waste, to prevent multiplicity of suits, to protect contractual rights in

real estate, and to protect one's dwelling from injuries rendering its occupancy insecure or uncomfortable. The complainants' case here does not fall within any of these classes, and they must, as has been before pointed out, show that the legal remedy is inadequate, the threatened damage irreparable.

The case of *Delaware, Lackawanna and Western Railroad Co. v. Breckenridge, supra*, is dispositive of this question. In that case the same subject-matter was involved, namely, pipes laid under the surface of the soil. It was there held that the remedy by ejectment was adequate, and the damage was not irreparable.

Both upon reason and authority, therefore, the complainants fail to show a proper case for the exercise of the jurisdiction invoked.

Much stress was laid at the argument and in the brief of the complainants upon the cases which hold that the exerciser of the right of eminent domain will be held to a strict compliance with all conditions precedent, and that a court of equity will protect the landowner against the improper exercise of such right. This is undoubtedly the law, but is inapplicable to the case at bar. The city in this case is not attempting to take this land for a street in virtue of any statutory right, or by the exercise of any power of eminent domain, but is claiming a legal right to take the street by virtue of dedication.

So far as this case is concerned, if the city has not the legal right which it claims is vested in it by virtue of the dedication, it has no legal right whatever. If it has that right, its conduct is justified. Whether or not it has that right is a legal question which, in this case, should be left to the determination of the legal tribunals, since the remedy there is adequate, the damage which is threatened not being irreparable.

I shall deny the application for a preliminary injunction in this suit.

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6 Buch.Schuhardt v. Witcke.

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JOHN SCHUHARDT

v.

CATHERINE WITCKE.

[Decided September 29th, 1909.]

1. Under *P. L. 1902 p. 534 § 70*, respecting unsatisfied judgments at law, defendant's dower right is applicable to the payment of the complainant's judgment against her.

2. So, also, is a certain sum of money deposited in a trust company in a special account credited "A. Conrad, Trustee for Katie Wiltske" (the defendant), the same being the avails of a check which she received from a fraternal or beneficial order of which her husband was a member at the time of his death.

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Heard on bill, answer, replication and proofs in open court.

*Mr. Marshall W. Van Winkle*, for the complainant.

*Mr. Warren Dixon*, for the defendant.

GARRISON, V. C.

The pleadings and proofs show that the complainant, on the 2d day of December, 1895, procured a judgment in the supreme court against the defendant for something over six hundred dollars, which is unpaid, and upon which execution unsatisfied has been returned.

The husband of the defendant died on the 18th day of April, 1909, intestate, and at the time of his death was seized in fee of a parcel of land in Jersey City, New Jersey, in which the defendant was entitled to her dower.

The complainant's contention is that this dower right is applicable to the payment of his judgment against her; and such is the law. *Tenbrook v. Jessup* (*Vice-Chancellor Grey, 1900*), 60 N. J. Eq. (15 Dick.) 234. This case was decided when paragraph 88 of the Chancery act (*Gen. Stat. p. 386*) was in force;

but it applies to the present situation because the existing act (*P. L. 1902 p. 534 § 70*) is similar in this respect to the former act.

The proofs further show that the husband of the defendant was a member of a fraternal or beneficial order called the Royal Arcanum, and that upon his death the said order paid to her, as his widow, the sum of \$2,000—that she caused the check received by her for this amount to be cashed on or about April 30th, 1909, and retained out of the same \$500, and that the balance was deposited in the Commercial Trust Company of Jersey City by one A. Conrad, in a special account credited “A. Conrad trustee for Katie Wiltske.” Subsequently, \$300 was withdrawn, leaving \$1,200 and accumulated interest in said account at the time of the suit.

The complainant contends that this money or credit so held in trust for the defendant is applicable (under the terms of the statute before cited) to the payment of his judgment, and I find that it is.

The defendant contended that it was not; basing her contention upon the theory that she had proved that the “trust had been created by, or the fund so held in trust has proceeded from, some person other than the defendant.” The quoted language is from the statute, and specifies what is excepted from the operation of the act.

The defendant sought to prove her contention by citations from the constitution and by-laws of the Royal Arcanum. The cited portions dealt with the objects and purposes of the order, and showed that it was intended to furnish funds to the dependents of members, and the argument of the defendant was that such funds when furnished at the death of the member to the named dependent remained impressed with a trust in such dependent's hands and were not reachable under the statute.

I cannot perceive the force of this argument. Whatever may be the purposes and objects of the order and the intention of its founders and members, the effect of its contract and conduct in this case was precisely similar to ordinary life insurance. It engaged to pay under certain circumstances to the defendant

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6 Buch.Taylor v. Wright.

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a certain sum of money upon the death of her husband. The husband died, and the Royal Arcanum paid her the money, which then became hers, and she then put this money in the hands of a trustee for her own benefit. Such a trust created by a person for her own benefit is within the language and operation of the act.

A decree will accordingly be advised for the complainant.

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MINERVA P. TAYLOR

v.

JENNY E. WRIGHT.

[Submitted May 7th, 1909. Decided May 19th, 1909.]

1. When the owner of two tenements sells one of them, or the owner of one entire estate sells a portion, the purchaser takes the tenement or portion sold with all the benefits and burdens which appear at the time of sale to belong to it, as between it and the property which the vendor retains.

2. The principle illustrated with respect to the case of overhanging eaves and porch as a *quasi*-easement reserved by implication for the benefit of the complainant as vendor.

3. The easement in question is of the class defined as continuous.

4. An action at law before the law court is the proper remedy for the determination of the existence or non-existence of such an easement, and the court of chancery will not enjoin the prosecution of such an action.

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On bill for injunction to restrain action at law.

*Messrs. Carrow & Kraft*, for the complainant.

*Messrs. Apgar & Boswell*, for the defendant.

LEAMING, V. C.

Complainant's husband owned certain land in Ocean City, Cape May county, fronting on Central avenue. On this land he

erected two dwelling-houses, similar in size and appearance. The houses both fronted on Central avenue and were but a few feet apart. The peak of the roof of each house was over the centre of each house and ran in a line at right angles to Central avenue, so that one-half of the roof of each house slanted towards the other house. The roofs of both houses extended beyond the line of the sides of the houses, forming eaves. The distance between the eaves of the two houses was but about thirteen inches. With the two houses thus standing side by side, and separated, as above stated, by but a few feet, and owned by complainant's husband, defendant purchased the easternmost house. An accurate survey of the land as described in the deed from complainant's husband to defendant discloses that the boundary line which passes between the two houses, when located on the ground, will cut off nine and eleven-sixteenths inches of the eaves and a few inches of the porch of the house not conveyed. Since the conveyance referred to was made complainant has acquired the property not conveyed by a deed from her husband through an intermediary. Defendant has now brought an action of ejectment against complainant to recover possession up to the boundary line described in the deed referred to. If recovery is had it will necessitate the removal of a part of the eaves and porch of complainant's house. The present suit is to restrain defendant from prosecuting the suit at law.

Complainant urges that the effect of the conveyance to defendant under the conditions named charges defendant's property with the burden of the overhanging eaves and porch as a *quasi-easement* reserved by implication for the benefit of complainant's house, while defendant claims that a *quasi-easement* of this nature cannot be implied by way of reservation because such claim is in derogation of the terms of the grant.

The law of this state touching easements of the nature here claimed must be regarded as settled to the effect that upon a severance of title a *quasi-easement* may arise by way of implied reservation as well as by way of implied grant. In *Central Railroad Co. v. Valentine*, 29 N. J. Law (5 Dutch.) 561, 564, the court of errors and appeals quotes, with approval, from *Lampman v. Milks*, 21 N. Y. 507, as follows:

"When the owner of two tenements sells one of them, or the owner of one entire estate sells a portion, the purchaser takes the tenement or portion sold with all the benefits and burdens which appear at the time of sale to belong to it, as between it and the property which the vendor retains."

On p. 564 the reasons for the rule are stated as follows:

"The law preserving the rights of the parties upon a severance of ownership of the entire estate, by creating an easement in favor of the part sold or retained, according to circumstances, seems to proceed upon the idea that in the absence of an expressed intention to destroy the burden, none will be implied from the mere fact of severance."

Other cases in this state are reviewed by Vice-Chancellor Pitney in *Tooth v. Bryce*, 50 N. J. Eq. (5 Dick.) 589, 605, and again by Vice-Chancellor Reed in *Greer v. Van Meter*, 54 N. J. Eq. (9 Dick.) 270. In both of these cases the conclusion is reached that it must be considered as here settled that upon the severance of the tenement, a reservation of a *quasi*-easement will take place on the conveyance of the servient part whenever it would pass by way of grant on the conveyance of the dominant part.

It is also settled that such easements will only arise when they are apparent and continuous and reasonably necessary to the beneficial enjoyment of the property conveyed or reserved. *Tooth v. Bryce*, *supra* (at p. 608), and *Greer v. Van Meter*, *supra* (at p. 272).

In the present case I think the easement claimed by complainant must be regarded as of that class recognized as apparent and continuous, and as reasonably necessary to the beneficial enjoyment of the building. Assuming, as it must be assumed under the pleadings, that the parties established the boundary line where they intended to establish it, the fact that the eaves and porch of complainant's house extended over the boundary line was apparent. It may be, as stated at the hearing, that the naked eye could not detect that the eaves extended over the boundary line; but it also appears that the porch extended over the line, and the diagram of the premises offered in evidence discloses that the eaves project from the body of the building



further than the porch. Upon the assumption that the parties knew that the line passed across the extreme end of the porch, the fact that the eaves also extended over the line must be regarded as apparent in the sense that it was apparent to the parties. The easement is also of that class defined as continuous. In *Fetters v. Humphreys*, 18 N. J. Eq. (3 C. E. Gr.) 260, 266; affirmed, 19 N. J. Eq. (4 C. E. Gr.) 471, Chancellor Zabriskie refers to overhanging roofs as an illustration of an apparent and continuous easement, as follows: "A continuous or apparent easement is either a fixture, or it is enjoyed by means of a fixture, upon the land itself. There is something visible by which it may be known to a purchaser, as an overhanging roof, open windows, a sewer, or a water pipe, actually engaged in fulfilling their duties. A right of way, a discontinuous easement of any kind, is only exercised at intervals, and is a latent encumbrance or claim, the very existence of which may depend upon uncertain and doubtful testimony."

That the easement now in question is reasonably necessary to the beneficial enjoyment of the house of complainant also seems apparent. It may be that the overhanging part of complainant's house can be removed and the extreme end of the porch cut off without injuring the strength of the house or unfitting it for occupation, but it is obvious that the removal of the eaves of the house will injure its appearance and value. I do not understand the rule to have been adopted in this state that the easement must be absolutely necessary to any enjoyment of the property whatever, as in the case of a way of necessity. Should the facts of the present case be reversed and the conveyance be assumed to have been from defendant to complainant, there seems to be no doubt but that complainant would be entitled to the preservation of the overhanging eaves and projecting porch as reasonably necessary to the beneficial enjoyment of the property conveyed, and, as stated in *Greer v. Van Meter*, *supra*, the same rules are applied in the case of reservation as in grant. As pointed out in *Central Railroad Co. v. Valentine*, *supra* (at p. 567), the intention of the parties must be understood from the language of the deed when applied to the subject-matter, and the intention of the parties to destroy the apparent

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and continuous conveniences will not be understood to have existed unless that intent is distinctly expressed.

The evidence at the hearing disclosed that it was the probable intention of the parties to establish the line at a point half way between the two houses. Had the bill been for reformation of the deed with that issue presented by the pleadings, that evidence would have been competent and might have entitled complainant to relief on that ground. The issue of reformation or mistake is not, however, presented by the present pleadings, and it also seems probable that the fact that complainant has, since the execution of the deed, suffered defendant to extend a bay window up to the line described in the deed, may now operate to bar relief by reformation.

I have given this expression of my views touching the issues presented because the jurisdiction of this court has been in no way challenged, except by the single objection that relief should not be here granted until after a judgment should have been entered in favor of the plaintiff in the pending action in the law court. But notwithstanding the fact that no objection to the jurisdiction is pending I feel obliged to recognize what I deem to be the well settled limitations of the jurisdiction of this court.

If the easement here asserted by complainant exists, it arises from well-defined rules of law and is a legal as distinguished from an equitable estate or interest. While this court has frequently recognized and protected rights of the nature here claimed, the occasion has uniformly arisen from a threatened permanent invasion of rights which, if permitted, would occasion irreparable injury. In the present case there is no such threatened invasion of any rights which complainant may possess, but on the contrary defendant has brought an action at law for the recovery of possession, and in that action the legal rights of complainant here asserted will, if they exist, afford a complete defence. That tribunal is the proper tribunal to determine the existence or non-existence of an easement or other legal estate in lands, and this court cannot properly determine an issue of that nature except to such extent as may be necessary to prevent irreparable injury. In *Hart v. Leonard*, 42 N. J. Eq. (15 Stew.) 416; *Outcalt v. Helme Co.*, 42 N. J. Eq. (15 Stew.) 665, and

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*Todd v. Staats*, 60 N. J. Eq. (15 Dick.) 507, the court of errors and appeals has clearly defined the limitations of the jurisdiction of this court in enforcing or protecting legal rights in real estate. To here enjoin defendant from prosecuting his action at law is to interfere with the law court in the discharge of its primary jurisdiction. That the rights asserted by complainant are purely legal rights is, I think, entirely clear. In *Valentine v. Central Railroad Co.*, 29 N. J. Law (5 Dutch.) 60; S. C., *Id.* 561, rights emanating in a similar manner as those asserted by complainant are treated as legal rights. See also *Stuyvesant v. Woodruff*, 21 N. J. Law (1 Zab.) 133.

I am obliged to advise an order dismissing the bill for want of jurisdiction; but as no demurrer has been filed I think no costs should be taxed. *Dan. Ch. Pl. & Pr.* 542.

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AARON T. HAGEMAN

v.

CHARLES G. BROWN and ROBERTA BROWN.

[Submitted May 18th, 1909. Decided May 21st, 1909.]

1. Complainant in equity must allege with particularity every material fact which it is necessary for him to prove to establish his right to the relief prayed.

2. Where complainant seeks equitable relief on the ground of fraud, his bill must state the facts constituting the fraud, so that the person against whom relief is sought may have full opportunity to deny or explain the facts charged, and disprove them.

3. Where a creditor's bill sought to reach certain money belonging to defendant alleged to have been secretly hidden in real estate purchased in the name of another in a specified manner, with a fraudulent purpose of placing it beyond the reach of creditors and preserving it for defendant's use by means of a secret trust, the manner in which the bill charged that the fraud was accomplished was a material part of complainant's cause of action, which defendant was required to specifically answer with fullness and particularity.

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4. That a bill to reach property held for defendant under an alleged secret trust was not a bill for discovery and contained no interrogatories, would not exempt defendant from answering fully and specifically all the material averments of the charging part of the bill.

5. The object of a complainant in waiving oath to the answer to a bill in equity is merely to deprive the defendant of his right to have the answer treated as evidence in his favor.

6. Defendant in equity is bound by admissions in his answer without oath.

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On exceptions to answer of defendant Charles G. Brown.

The purpose of the bill in this suit is to procure a decree declaring the equitable title to certain real estate to be vested in defendant Charles G. Brown, the legal title to which now stands in the name of his daughter Roberta Brown, to the end that the real estate may be subjected to the lien of a certain judgment held by complainant against defendant Charles G. Brown. The bill charges that Roberta Brown, the daughter who holds the legal title, has no beneficial interest in the premises, but holds the same in trust for her father with the intent and purpose of defrauding complainant and other creditors of the father, and preventing them from collecting their claims against the father, and charges that the consideration for the conveyance to the daughter moved from the father and not from the daughter. In amplification of this general charge of fraud, the bill specifically sets forth the manner in which the legal title to the property was placed in the name of the daughter. The specific averment is that defendant Charles G. Brown made an agreement with one Mary A. Moffett, the former owner of the property, whereby he agreed to purchase the property for a certain amount, and that in the performance of that agreement he paid to the vendor the purchase price so agreed upon and caused the deed to be made to his daughter Roberta. The specific averment is also made that of the money so paid a certain specified amount was money due to him from one Alfred S. Brown, which money was paid by Alfred S. Brown to the vendor at the request of and for and on account of defendant Charles G. Brown as a part of the said purchase price; and that a certain further part of the purchase price was paid to

the vendor by the said Alfred S. Brown as a loan to defendant Charles G. Brown, and that the repayment of the latter amount was secured to Alfred S. Brown by a mortgage on the premises executed by the daughter Roberta at the request of her father. The answer filed by defendant Charles G. Brown states that the agreement for the purchase of the property was made by him as agent and attorney in fact for his daughter, at her request and for her benefit, and that she is the sole owner of the legal and equitable title. The answer also contains the following denials:

"This defendant denies that the consideration moved from the said defendant Charles G. Brown to the said Mary A. Moffett as alleged in the bill of complaint filed in this cause.

"This defendant denies that the title to said described premises in said bill of complaint filed in this cause was put in the name of Roberta Brown at his request for the purpose of defrauding his creditors and hindering and defrauding them in the collection of their just claims against him.

"This defendant denies that the said Roberta Brown holds the title of said premises described in said bill in trust for him or that he has any beneficial interest in the premises whatever as alleged in said bill of complaint filed in this cause."

Complainant has excepted to the sufficiency of the answer by reason of its failure to answer in detail the specific averments of the bill above set forth touching the manner in which the purchase price of the property was raised and paid.

Defendant insists that he is excused from answering specifically the detailed averments of the bill touching the manner in which the purchase price of the property was raised and paid, and is privileged to answer generally to the effect that the consideration did not move from him, because these specific averments of the bill are matters of evidence, because the bill is not a bill for discovery and contains no interrogatories, and because the bill asks for an answer without oath.

*Mr. Paul Q. Oliver*, for the complainant.

*Mr. George Ball*, for the defendants.

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6 Buch.Hageman v. Brown.

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LEAMING, V. C.

I am convinced that the exceptions to the answer must be sustained.

1. There are probably few rules of equity pleading more firmly established than the requirement that every material fact which it is necessary for a complainant to prove to establish his right to the relief he asks must be alleged in the premises of his bill with fullness and particularity, and that a suitor who seeks relief on the ground of fraud must state the facts which constitute the fraud, so that the person against whom relief is sought may be afforded a full opportunity to deny or explain the facts charged, and also to disprove them. *Smith's Administrator v. Wood*, 42 N. J. Eq. (15 Stew.) 563, 566. This bill, in effect, seeks to reach certain money belonging to defendant, which money has been by defendant secretly hidden in certain real estate, in the manner specifically set forth in the bill, with the fraudulent purpose of placing it beyond the reach of creditors and preserving it for his own use by means of a secret trust. The manner in which the bill states that this was secretly accomplished forms a part of the alleged fraudulent transaction, the averment being, in effect, that a third party paid the money, but that the money so paid was in fact money which the third party owed to defendant; the facts so stated are specific and definite facts which are material to complainant's case. In this view it seems clear that defendant cannot be excused from specifically answering these detailed averments of material facts under the claim that they are evidentiary in their nature. I regard the general averments contained in the bill to the effect that the consideration moved from defendant, which averment defendant has answered by a general denial, as more nearly a general statement of a conclusion of law than a specific statement of concrete facts. Had the averments in question been added to the present bill in the form of interrogatories, I think the necessity of specific answers to the interrogatories would not be questioned.

2. The fact that the bill is not a bill for discovery and contains no interrogatories, will not exempt defendant from an-

swering fully and specifically the material averments of the stating part of the bill. The rule, as stated by Judge Story, is as follows:

"One of the principal ends of an answer upon the part of the defendant is, to supply proof of the matter necessary to support the case of the plaintiff; and it is therefore required of the defendant, either to admit, or to deny, all the facts set forth in the bill, with their attending circumstances, or to deny having any knowledge or information on the subject, or any recollection of it, and also to declare himself unable to form any belief concerning it. And this he ought to do fully and explicitly even though no special interrogatories should follow the bill. But, as experience has proved, that the substance of the matters charged in the bill may frequently be evaded by answering according to the letter only, it has become a practice to add to the general requisition, that the defendant should answer the contents of the bill, a repetition, by way of interrogatory, of the matters most essential to be answered, adding to the inquiry after each fact, an inquiry of the several circumstances, which may be attendant upon it, and the variations, to which it may be subjected, with a view to prevent evasion, and compel a full answer." *Story's Eq. Pl. § 35.*

This privilege of adding special interrogatories to a bill has not, so far as I am aware, except where controlled by court rules, been given the effect to absolve, in any manner, a defendant from the primary duty of answering all of the material averments of the bill. The bill in this case prays that defendants "may, without oath, full, true and perfect answer make to each and every of the matters and things above set forth, as fully and particularly as if the same were here again repeated and they thereto particularly interrogated." I understand the rule in this state to be substantially as stated in *Methodist Episcopal Church v. Jaques*, 1 Johns. Ch. 65, as follows:

"I apprehend the rule on this subject to be that it is sufficient to make this general requisition on the defendant to answer the contents of the bill, and that the interrogating part of the bill, by a repetition of the several matters, is not necessary. The defendant is bound to deny or admit all the facts stated in the bill, with all their material circumstances, without special interrogatories for that purpose. *Mitf. Pl. 44; Coop. Eq. Pl. 11, 12.* They are only useful to probe more effectually the conscience of the party, and to prevent evasion or omission

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6 Buch.Hageman v. Brown.

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as to circumstances which may be deemed important; but it is no excuse for the defendant, in avoiding to answer fully to the subject-matter of the bill, that there were no special interrogatories applicable to the case."

3. The foregoing is equally true where the bill prays for an answer without oath. The object of a complainant in waiving oath is merely to deprive the defendant of the advantage of his answer as evidence for himself. A defendant is bound by his admissions in his answer without oath. In *Reed v. Cumberland Insurance Co.*, 36 N. J. Eq. (9 Stew.) 393, Chancellor Runyon says:

"He [complainant] has a right to the defendant's answer on every material point, though he waives oath. For he is spared the necessity of proof as to all matters admitted by the defendant. The latter is bound by his admissions in the answer, though put in without oath."

My conclusion is that the bill entitles complainant to a specific answer as to whether at the time of the conveyance from Mary A. Moffett to Roberta Brown, Alfred S. Brown owed defendant Charles G. Brown certain money and paid the money so owing to Mary A. Moffett on account of the purchase price of the property in question for or on account of and at the request of defendant Charles G. Brown; and as to whether the remaining portion of the purchase price referred to in the bill was paid to Mary A. Moffett by Alfred S. Brown as a loan to defendant Charles G. Brown, or for or on account of or at the request of defendant Charles G. Brown.

I will advise a decree sustaining the exceptions to the answer.



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Kohn v. Kelly.

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76 Eq.

ARNOLD KOHN

v.

SAMUEL H. KELLY et al.

[Submitted May 28th, 1909. Decided June 8th, 1909.]

Upon the foreclosure of an usurious mortgage the defendant is entitled to a credit on the principal of the interest payment made in excess of the legal rate.

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On bill to foreclose usurious mortgage.*Mr. Lewis Starr*, for the complainant.*Messrs. Bourgeois & Sooy*, for the defendants.

LEAMING, V. C.

The single question here presented is whether our statute against usury entitles defendant to a deduction from the amount actually loaned of all interest which has been paid by him, or only entitles him to a deduction of the amount of illegal interest paid by him.

I am unable to consider this an open question in this state. In all cases in which the subject appears to have been directly considered the view has been uniformly adopted that the statutory deduction from the amount actually loaned of interest already paid is of the interest which has been paid in excess of the legal rate. *Pond v. Causdell*, 23 N. J. Eq. (8 C. E. Gr.) 181; *Bedle v. Wardell*, 25 N. J. Eq. (10 C. E. Gr.) 349; *Terhune v. Taylor*, 27 N. J. Eq. (12 C. E. Gr.) 80; *Mahn v. Hussey*, 28 N. J. Eq. (1 Stew.) 546; *Boyd v. Engelbrecht*, 36 N. J. Eq. (9 Stew.) 612; *Pfenning v. Scholer*, 43 N. J. Eq. (16 Stew.) 15; *Hintze v. Taylor*, 57 N. J. Law (28 Vr.) 239.

In *Lowenthal v. Myers* (not reported) I ordered an interest

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6 Buch.Redrow v. Sparks.

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payment credited on the principal of a usurious mortgage, and the court of errors and appeals appears to have affirmed that part of my decision. 72 Atl. Rep. 80. The language of the statute touching interest payments already made was not brought to my attention in that case, and I think it reasonable to assume that the appellate court made a similar oversight, for I am entirely satisfied that the latter court would not have intentionally departed from its former views without some expression of the reasons for so doing.

I will advise a decree for complainant for \$5,000, less the interest payment made in excess of the legal rate, and without costs.

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ANNIE A. REDROW

v.

J. KATHERINE SPARKS et al.

[Submitted and decided June 21st, 1909.]

1. In the foreclosure of a purchase-money mortgage which has been given to a vendor by the vendee mortgagor for all or a part of the consideration of a deed of conveyance for the same premises containing covenants of warranty of title or against encumbrances, the vendee mortgagor may be allowed a deduction, by reason of the covenant against encumbrances contained in the deed, for prior mortgages, taxes, assessments or judgments; relief may also be given the vendee mortgagor by reason of the covenant of title contained in the deed if there has been an eviction by title paramount; relief may also be given in such case for fraud; or for the conveyance of less land than bargained for; the foreclosure may also be arrested pending an action at law to try the title of an adverse claimant. No relief can be given the vendee mortgagor on his assertion of an outstanding title when there has been no eviction and no action is pending to enforce it; in such case the vendee mortgagor will be left to his remedy at law on the covenants.

2. The right of rescission of a contract must be asserted within a reasonable time; the retention of the benefits of the contract is inconsistent with the assertion of that right.

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Redrow v. Sparks.76 Eq.

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3. A defect of title which has been removed before final hearing and which has caused no damage to the vendee, affords no ground for relief of the vendee mortgagor in a suit to foreclose a purchase-money mortgage. But in such case partial relief may be given against costs.

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On bill to foreclose and cross-bill.

*Mr. G. Dore Cogswell*, for the complainant.

*Mr. Joseph J. Summerill*, for the defendant.

LEAMING, V. C.

The defences available to a mortgagor in resisting the foreclosure of a purchase-money mortgage which he has given to his vendor for all or a part of the consideration of a deed of conveyance to him for the same premises containing covenants of warranty of title, or against encumbrances, are considered by Vice-Chancellor Stevens in *Kuhnen v. Parker*, 56 N. J. Eq. (11 Dick.) 286, and the adjudications in this state in cases of that class are there collected. It will be observed that where there is a covenant against encumbrances, the mortgagor may be allowed a deduction for prior mortgages, taxes, assessments or judgments; where there is a covenant of title and there has been an eviction by title paramount, relief may be given to the mortgagor; relief may also be given when the mortgagor has been defrauded; or has by mistake obtained less land than he bargained for; the foreclosure may also be arrested pending action at law to try the title of an adverse claimant; but no relief can be given to the mortgagor on his assertion of an outstanding title where there has been no eviction and no action is pending to enforce it. In the latter case the mortgagor will be left to his remedy at law on the covenants.

In the present case the cross-bill asserts fraudulent representations upon the part of complainant which, if sustained, might afford ground for equitable relief. The evidence, however, discloses no fraud. Any representations which may have been made touching the title were innocently made. Cross-complain-

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6 Buch.Redrow v. Sparks.

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ant conceded this upon the witness-stand, and other evidence fully established the fact.

At the hearing cross-complainant was permitted to treat his cross-bill as amended, touching all matters relating to damages sustained by her from any cause, and complainant was permitted to treat her bill as supplemental by the averments of matters which had transpired touching the title after the original bill was filed. The evidence fully established that all defects of title had been cured prior to the time of the hearing. The evidence touching damages received by cross-complainant by reason of the removal of buildings or the want of repair of the premises was insufficient to either warrant a rescission of the contract or to establish a right to an offset or allowance against the mortgage. Had cross-complainant sought a rescission of the contract that remedy should have been applied for earlier; possession was taken after the buildings were removed, of which complaint is now made, and the premises were occupied a year without complaint of the absence of the buildings referred to, or of the want of repair of the buildings; any right of rescission which may have existed by reason of want of repair or loss of buildings must be regarded as having been waived; the sale of timber from the property had a like effect. The evidence does not satisfy me that any fraudulent representations touching either the character or extent of the buildings were in fact made, and neither the written contract nor the deed of conveyance contain any covenant of that nature. Had there been any representations which included the idea that the roof of the house was in good repair, I think some complaint would have been made when it was found to be otherwise. I think it may have been understood by the parties that a chicken-house was to remain on the premises; but the cost of a new chicken-house was not proven, even if it be assumed a proper offset.

I am also unable to discern any reason for denying a decree because of defects of title existing at the time the bill was filed, which defects were then unknown to the parties and were removed before the time of the hearing. As already stated such defects have been held to afford no defence to foreclosure until

adverse rights are asserted; but assuming that relief could be granted cross-complainant in this court by reason of the defects of title referred to, as the defects have been removed before final decree, no relief is now practicable, for no substantial damages have been sustained by cross-complainant by reason of the defects complained of. In specific performance cases by a vendor a good title at final decree is usually held sufficient. *Oakey v. Cook*, 41 N. J. Eq. (14 Stew.) 350, 364; *Moore v. Galupo*, 65 N. J. Eq. (20 Dick.) 194, 198; *Agens v. Koch*, 70 Atl. Rep. 348. In the present case the title was promptly perfected when the defects were discovered.

I think, however, that cross-complainant is equitably entitled to be relieved from such costs as have accrued that would not have accrued had the title been perfect when the bill was filed. The evidence discloses with reasonable clearness that after the bill was filed a client of Mr. Summerill would probably have loaned cross-complainant the necessary money to discharge the mortgage and stop the foreclosure had the title been found marketable, and that the loan failed because of the title defects. In view of this fact I think complainant should recover the taxed costs incident to the filing of the bill and issuing and serving the subpoenas and no more, unless cross-complainant makes it necessary to issue an execution, in which case the costs of decree and all subsequent proceedings may be properly taxed.

I will advise a decree for complainant for the amount of the mortgage with interest to the date of the decree, together with the costs above referred to.

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6 Buch.      Fitzgerald v. State Mutual Building & Loan Assn.

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PATRICK FITZGERALD

v.

STATE MUTUAL BUILDING AND LOAN ASSOCIATION.

[Decided May 9th, 1909.]

1. In the distribution of assets among the stockholders of an insolvent building and loan association neither the owners of stock known as "full paid stock" nor owners of stock known as "advance payment stock" are entitled to preferment as such.

2. Nothing either in the statute or by-laws contemplates that such stock shall become preferred stock in the sense that such stock shall be entitled to preferment in the distribution of assets at dissolution, or that its holders shall become general creditors of the association as distinguished from stockholder members.

3. Neither are the holders of stock on which notices of withdrawal have been given entitled to preferment in such case.

4. The only equitable plan for distribution of the assets of such association is the *pro rata* division of the assets among all of the stockholders, giving to each share of stock a value, for purposes of distribution, of the amount paid on it.

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*Mr. Thomas E. French, Mr. Samuel K. Robbins and Mr. George J. Bergen, for the receivers pro se.*

*Mr. Harvey F. Carr, for sundry stockholders.*

*Mr. Ralph E. Lum, for sundry stockholders.*

LEAMING, V. C.

The receivers of defendant building and loan association now desire to make a partial distribution of assets among the stockholders of the insolvent association, and to that end have brought in all parties in interest that it may be determined, among other things, whether certain stockholders are entitled to preferment in the distribution of assets. As the assets of the association will be insufficient to pay the full amount paid in by its members,

it becomes necessary to ascertain whether certain stock is entitled to priority of payment over other stock. The present contest arises by reason of the claim of preferment made by the owners of stock who gave notice of withdrawal before the suspension of the business of the association, and also a like claim made by owners of certain stock known as "full paid stock" and certain other stock on which "advance payments" have been made. The advance payments are authorized by section 7 of the constitution of the association, which section permits any stockholder to pay in advance money on account of his installments of dues and entitles the person so paying to receive a certain discount for the advance payments. The "full paid stock" is authorized by section 8 of the constitution. That section authorizes a stockholder to pay \$100 per share for his stock and entitles the person so paying to receive a certain rate of interest on the amount paid until the stock of that series matures. The right of withdrawal is conferred by section 9 of the constitution and the terms of withdrawal are set forth in article 4 of the by-laws, and in sections 38 and 39 of an act of the legislature approved April 8th, 1903. *P. L. 1903 p. 457.* Of the full paid stock there are nine hundred and forty-five shares; of these, thirty-eight owners of one hundred and twenty-eight shares have given notice of withdrawal and two hundred and twenty-six owners of the remaining eight hundred and seventeen shares have not. Of the "advance payment stock" there are ten thousand one hundred and forty-one shares. Of these, two hundred and ninety-six owners of five thousand three hundred and five shares have given notice of withdrawal, and eight hundred and sixty-seven owners of the remaining four thousand eight hundred and thirty-six shares have not. Of the remaining stock of the association, that is, stock on which no advance payments have been made, there are seventeen thousand and fifteen and one-half shares. Of these, eight hundred and eighteen owners of two thousand one hundred and nine shares have given notice of withdrawal, and two thousand three hundred and sixty-seven owners of the remaining fourteen thousand nine hundred and six and one-half shares have not. The evidence discloses that some time prior to two years before the suspension of busi-

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*6 Buch.*      **Fitzgerald v. State Mutual Building & Loan Assn.**

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ness the association began to receive a great number of withdrawal notices and that the withdrawals continued thereafter in such numbers that during the two years prior to suspension loans on real estate security were practically discontinued. During that period but three loans were made on real estate security: one in April, 1905, for \$1,600; one in July, 1905, for \$1,000, and one in August, 1905, for \$250. The only loans made during that period, except as above stated, were what was known as "stock loans;" these are described as loans to members exercising the right to borrow ninety per cent. of the withdrawal value of their stock by pledging their stock as security. Many members borrowed in this manner because they could not procure their money by withdrawal without waiting a long time. During the two years referred to the withdrawal notices accumulated until at the date of suspension the withdrawal notices unpaid amounted in the aggregate to \$232,143.88. Payments on withdrawal notices were made in the order in which the notices were filed and at the date of suspension applications for withdrawals to the amount of \$172,779.22 had been on file more than six months. At the hearing an examination was also made of the assets and liabilities of the association as of the date of its annual statement about two years before its suspension of business. If the testimony of the receivers as to the value of the real estate can be regarded as reasonably accurate, the value of the assets of the association two years prior to its suspension had become less than the amount at that time paid in by its members.

There appears to be no reasonable ground for the contention that either the "full paid stock" or the "advance payment stock" is entitled to preferment as such. Only one kind of stock is contemplated by the charter act or by-laws. The provisions above referred to touching full paid stock and advance payments of dues are mere privileges given alike to all stockholders. Such payments are payments on stock, and in no sense loans to the association. The consideration for the advance payments of dues and for the full payments on stock passes at the time of payment to the same extent as all other payments on stock. Nothing in either the statute or by-laws contemplates that the stock so issued shall become preferred stock in the sense that



such stock shall be entitled to preferment in the distribution of assets at dissolution or that its holders shall become general creditors of the association as distinguished from stockholder members. The decisions of the courts appear to be practically uniform in the adoption of this view. *People v. New York B. & L. Ass'n*, 110 N. Y. App. Div. 554; *People v. Metropolitan Mut. B. & L. Ass'n*, 103 N. Y. App. Div. 153; *Forwood v. Eubank* (Ky. App.), 50 S. W. Rep. 255; *Solomons v. Am. B. & L. Ass'n*, 116 Fed. Rep. 676; *Hohenshell v. Home B. & L. Ass'n*, 140 Mo. 566; *Leahy v. National B. & L. Ass'n*, 100 Wis. 555. Furthermore, the Building and Loan Association act of 1903 (*P. L. 1903 p. 457*) expressly forbids the issuance of preferred stock. Section 53 of that act provides as follows:

"No such association (building and loan association) shall issue preferred stock or other than common stock, and all shareholders shall occupy the same relative status as to debts and losses of the association."

It also seems entirely clear that no claim of preferment upon the part of stockholders who have given notice of withdrawal can be sustained, so far as such claim is based upon the provision of the by-laws touching withdrawals. The by-laws provide that "at no time shall the association be required to pay out on withdrawals more than one-half of the monthly receipts of dues." The evidence discloses that in every month during the last two years of the life of the association more than one-half of the dues were paid for withdrawals, and in almost every month the amount paid for cash withdrawals exceeded the amount received for dues, and this is also true even when advance payments on stock and payments for full paid stock are treated as dues of the month in which such payments were received. The aggregate amount received during the two years named for dues, including advance payments and payments for full paid stock, was \$342,447.72, whereas the amount paid for cash withdrawals during the same period was \$442,368.07. These payments were made on withdrawal notices in the order of their dates. It thus appears that at the time of dissolution no payment was due under the terms of the by-laws on any withdrawal notice. It has, I think, been uniformly held that the right of withdrawal does not exist

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6 Buch.      Fitzgerald v. State Mutual Building & Loan Assn.

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except as conferred by a by-law or statute, and when so conferred the right will be restricted to the terms of the by-laws or statute. *Miers v. Columbia Mut. B. & L. Ass'n*, 157 Fed. Rep. 940; *Rabbitt v. Wilcozen*, 103 Iowa 35; *Heinbokel v. National S. L. & B. Ass'n*, 58 Minn. 340.

But in the year 1903 a general act was passed touching building and loan associations. *P. L. 1903 p. 457*. Sections 38 and 39 of that act relate to the subject of withdrawals. The latter section provides:

"Withdrawals shall be paid in the order in which the notices thereof are received, but not more than one-half the receipts of any one month shall be required to be used for payment of withdrawal claims, without the consent of the board of directors, until the oldest of such claims then unpaid shall have been on file for a period of six months; but in no case shall payment be postponed for a period longer than six months from the date of such notice, and any shareholder who has given the said notice may sue for and recover the withdrawal value of his shares in any such association in any court of competent jurisdiction, if the same is not paid in six months from the date of the giving of said notice of withdrawal."

As already stated a part of the withdrawal notices in question had been on file over six months at the time of suspension, while others had not. It is not easy to determine what this statute may contemplate by the use of the word "receipts." The inquiry, however, does not appear to be material, because the statute requires all notices on file six months to be paid irrespective of the amount of receipts, and the notices on file less than six months would not have been reached had one-half of all receipts from all sources, including dues, interest, premiums, fines, advance payments on stock, moneys received for full paid stock and loans repaid to the association been applied to the payment of the withdrawal notices. More than one-half of the moneys received from all sources was, in fact, applied to the payment of withdrawals, although it does not appear that any resolution was adopted by the board of directors consenting thereto. As none of the notices of withdrawals which had been on file less than six months were payable either under the terms of the by-laws or the terms of the statute, it follows, as is shown by the cases last above cited, that they cannot be regarded as preferred claims.

The only doubt which I entertain is touching rights which may have arisen under notices which had been on file over six months at the date of suspension; but independently of the considerations already stated, I am convinced that neither the claim based on notices filed less than six months nor those based on notices filed more than six months can be now properly treated as entitled to preferment in the distribution of assets. There may be some question as to whether the statute of 1903 can be regarded as superseding the by-laws so far as the rights of stockholders prior to that date are concerned, for rights accruing under the by-laws partake of the nature of contractual rights between the several members; but I think the conclusion just stated must be reached even though the statute be regarded as controlling as to all stockholders. As already stated the right of a stockholder to "withdraw" by surrendering his shares and withdrawing money in lieu of them and in that manner to terminate his membership, is derived from the by-laws of an association, or from a statute if the subject is controlled by statute. In either case the rights, privileges and liabilities flowing from the proceeding must be ascertained from the by-law or statute controlling the subject. The question is therefore essentially one of statutory construction. The English decisions construe a by-law or rule which confers the right of withdrawal with peculiar strictness, and while they recognize that the notice of withdrawal does not terminate the membership of the stockholder giving notice nor constitute him a creditor of the society in an unrestricted sense, yet they treat his claim as entitled to preferment at dissolution. See *Walton v. Edge*, 10 App. Cas. 33; *Sibun v. Pearce* (1890), 44 Ch. Div. 354; *In re Sunderland Society* (1890), 24 Q. B. Div. 394; *In re Ambition Building Society* (1896), 1 Ch. 89. The *Sunderland Case*, however, gives recognition to the rule of construction that the by-law or statute conferring the right of withdrawal may not contemplate the exercise of the right except while the society "was or was believed to be" still solvent. While the decisions in this country cannot be said to be uniform, the view appears to be generally adopted that upon the distribution by a court of equity of the assets of an insolvent building association among its stockholders the by-laws or

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6 Buck.      Fitzgerald v. State Mutual Building & Loan Assn.

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statute which confers the right of withdrawal will be understood to have reference to the general mutual and equitable scheme of such association and to presuppose that at least a relative proportion of the assets will remain for the benefit of those who continue to be active members of the association. In this view it is held that notices of withdrawal which have matured after the association has reached an insolvent condition are not entitled to preferment of payment at dissolution. Some of the decisions go even further, and hold that independently of the fact of insolvency at the time a withdrawal notice is given or matures, the basis of distribution is not the rule of the association expressed in a by-law or statute, standing alone, but the supreme rule of equality and mutuality. The following are among the cases adopting the views stated: *Reddick v. United States Building and Loan Association*, 100 Ky. 94; *Christian's Appeal*, 102 Pa. St. 184; *Walker v. Terry* (Ala.), 35 So. Rep. 466; *Rabbitt v. Wilcozen*, 103 Iowa 35; *Hohenshell v. Home Savings Association*, 140 Mo. 566; *Reitz v. Hayward*, 100 Mo. App. 216; *Fort Smith Building Association v. Cohn*, 75 Ark. 497; *Alexander v. Southern Home Building and Loan Association*, 110 Fed. Rep. 267; *Coltrane v. Baltimore Building and Loan Association*, 110 Fed. Rep. 272; *Colin v. Wellford*, 102 Va. 581; *Manheimer v. Henderson Building and Loan Association* (Ky.), 72 S. W. Rep. 313. See, also, 6 Cyc. 165; *End. Build. Asso.* (2d ed.) §§ 108, 514, 515.

The General Building and Loan Association act of 1903, of which the sections already referred to touching withdrawals form a part, will be found to contemplate throughout its provisions the central idea of co-operation, equality and mutuality upon the part of the members of the association. That part of section 53, already quoted, which provides that "all shareholders shall occupy the same relative status as to debts and losses of the association" is but in harmony with the general plan of the act. The general plan of the act being as stated, I am unable to believe that sections 38 and 39, relating to withdrawals, were intended by the legislature to be applicable to associations which should have reached an insolvent condition. I entertain the view

expressed in the *Coltraine Case*, already cited, that these provisions touching withdrawals, like the other provisions of the act, are obviously intended and are equitably applicable only so long as the association is a going concern from which all the members may ultimately hope and expect to receive approximately equal benefits. In the ascertainment of the legislative intent, I do not think it proper to ignore the obvious fact that if the sections referred to are held to apply to insolvent associations and to entitle its withdrawing members to be paid in the order in which their notices of withdrawal are given, the practical result will inevitably be to afford a means of preferment for those who are in the best position to know the true condition of the association to the exclusion of the poor and ignorant. I do not think that such a plan can be reasonably said to have been within the contemplation of the legislature. It is true that the act gives to a withdrawing member, whose notice of withdrawal has been on file over six months, a right of action for the "withdrawal value of his shares." But the statute does not contemplate that the withdrawal value of shares can in any case exceed the proportionate part of the assets of the association represented by the shares. That amount the receivers are willing to pay when the assets are reduced to cash, first deducting the cost incident to reducing the assets to cash. But the holders of stock on which notices of withdrawal have been given demand full payment in the order in which the notices have been filed. What amount they demand is not by them specified. The testimony touching the assets of the association discloses with reasonable certainty that no share of stock now in question would have been entitled, at the date of the notice given for its withdrawal, or at any subsequent date, to receive the full amount paid in on it, had there been applied to the share the full proportionate part of the assets of the association. The statute says:

"If the withdrawal be made within the first year, the withdrawal value of the shares withdrawn shall be not less than the sum of the subscriptions or dues paid on such shares, less all unpaid fines and a proportionate share of any loss sustained by the association; after the first year, a reasonable share of the profits shall be included in the withdrawal value and shall be paid to the withdrawing shareholder."

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Whether the provision for payment "after the first year" also contemplates deduction of a proportionate share of the losses is not clear, but I apprehend the meaning to be that if stock is withdrawn during its first year it shall not share in the profits, but may do so if later withdrawn, and that all withdrawn stock shall bear its share of losses. Assuming that to be the meaning of the statute, I doubt whether it is possible to now ascertain the withdrawal value of the several shares of stock of which notice of withdrawal has been given, if they are to be treated as preferred and are to be paid in the amount of their withdrawal value in the order in which notices of withdrawal has been given. As already shown, more than one-third of the entire stock of the association, which is owned by about one-third of its members, is under notices of withdrawal. In my judgment, the only equitable plan for distribution of the assets of the association is the *pro rata* division of the assets among all of the stockholders, giving to each share of stock a value, for purposes of distribution, of the amount paid upon it.

The status of a withdrawal notice at dissolution appears to be an open question in this state. In *Silvers v. Merchants Saving Fund and Building Association*, 56 Atl. Rep. 294 (not officially reported), Vice-Chancellor Grey gave to a withdrawal notice the effect of constituting the owners of the stock a general creditor of the association and entitling him to preferment at final distribution by a receiver in insolvency. In the later case of *Whitehead v. Commonwealth Building and Loan Association* (file number, 25-302), Vice-Chancellor Pitney reached the contrary conclusion. No opinion was filed by the learned vice-chancellor in the case last referred to, but I am informed that his decision was reached after a full argument and careful review of the adjudicated cases, including the *Silvers Case* above referred to. I know of no other case in this state in which the court has been called upon to determine the status of withdrawal notices in the distribution of assets among stockholders.

My conclusion is that the statutory right of a member of a building and loan association to withdraw from membership and to receive the withdrawal value of his shares and the statutory

privilege to sue for the amount if it is not paid within the time named in the statute, is based upon and forms a part of the general plan that each member is entitled to equal participation in the assets, and that the statute does not contemplate that the privileges named shall be exercised to defeat equal participation, and that the spirit of the statute being equal participation, the paramount equity is equal participation at all times; and when the association has reached a condition in which the value of its assets is less than the amount which has been contributed by its members as dues, the equitable right of equal participation cannot be defeated by a course of management which will bestow upon withdrawing members, by an artificial and erroneous assumption of withdrawal values, an unequal share of the assets. As no losses are shown to have been sustained during the period between the date of the oldest withdrawal notice now on file and the date of suspension of business, except such losses as may have arisen by the payment to prior withdrawing members of more than their equal share, the present claimants under withdrawal notices, if now treated the same as other members, will receive, with the exception noted, substantially the same amount that they would have received had the suspension of business occurred at the date of the oldest notice.

I will advise a decree of equal distribution.

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6 Buch.Defiance Fruit Co. v. Fox.

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DEFIANCE FRUIT COMPANY

v.

THOMAS C. FOX

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THOMAS C. FOX

v.

DEFIANCE FRUIT COMPANY et al.

[Submitted July 14th. 1909. Decided July 16th, 1909.]

1. A riparian proprietor is entitled to have the stream discharge its waters in its natural course and in its natural way, except to the extent to which a lower riparian proprietor having constructed a dam across the channel has acquired a prescriptive right to interrupt the natural flow.

2. Evidence reviewed, and *held* to require a finding that defendant had obtained a prescriptive right to raise the water of a stream by means of a dam only to a height three inches below the level claimed by him.

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On bill and cross-bill.*Mr. Henry S. Alvord*, for the complainant.*Mr. George J. Bergen* and *Messrs. Carrow & Kraft*, for the defendants.

LEAMING, V. C.

On October 26th, 1905, a bill was filed by Defiance Fruit Company (hereinafter referred to for convenience as "the company") for an injunction to restrain Thomas C. Fox (hereinafter referred to as "Fox") from raising the water in his mill pond at Willow Grove, New Jersey, to a height which was alleged to injure a cranberry bog on the land of the company situate above



the mill pond on either side of a natural stream which flows into the pond. Fox answered asserting that he and his predecessors in title had maintained the water in the pond at the height complained of for over twenty years prior to the date of the filing of the bill. When the cause came on for final hearing, it was ascertained that the issues involved were purely legal rights, the existence of which were in substantial dispute, and this court, in consequence, refused to entertain jurisdiction until the legal rights in dispute were determined at law; the bill was, however, retained, pending a proposed action at law, because of the absence of any denial of equity jurisdiction on the part of defendant. Accordingly the company brought an action of trespass against Fox, and after trial a verdict was rendered in favor of defendant. Thereafter the company brought another similar action at law against Fox, and before the trial of that action Fox, by leave of this court, filed, in the original equity suit, a cross-bill in the nature of an original bill in which the history of the litigation up to that time was recited and the suits at law were alleged to be vexatious, and the company and others in interest were made parties to the end that this court should make a decree determining the level to which the water in the mill pond could be lawfully maintained. The several defendants to the cross-bill answered and joined in the prayer of the cross-bill that this court determine the level at which the waters of the pond could be lawfully held by the mill owner.

The mill pond is formed by a dam which interrupts the flow of a natural stream known as "Scotland Branch," and the cranberry bog of the company is on either side of that stream a mile or more above the dam. The dam has been maintained by Fox and his predecessors in title for upwards of fifty years, and the two mills now owned and operated by Fox have during that time been supplied with power from the waters of the pond.

The testimony adduced at the hearing, and especially when considered in connection with a view of the premises made by me at the request of the respective counsel, leaves no doubt in my mind but that, with the water in the pond maintained at the height at which Fox claims the right to maintain it, the natural and beneficial flow of the stream passing through the property

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of the company is interrupted and interfered with by the back water occasioned by the dam in a manner and degree which materially injures the property of the company. This fact is so manifest that I think it unnecessary to enter upon a discussion of the evidence further than to state that the level at which Fox claims the right to maintain the water in the pond is above the level of the bed of the stream passing through the company's bog; when this level is raised to the extent necessary to enable the stream to discharge the waters which flow down it under normal conditions—about six inches—the water overflows the banks of the stream at the lower or southerly portion of the bog and also prevents proper drainage of other parts of the bog. In other words, the water of the pond, when maintained at the level at which Fox claims the right, operates to interrupt the natural flow of the stream through the company's land and to back water on its bog.

It is entirely clear that the company is entitled to have this stream discharge its waters in its natural course and in its natural way except to the extent to which Fox has established a prescriptive right to interrupt the natural flow. As the right of Fox to thus interfere with the natural and beneficial flow of the stream through the company's property is claimed by him to exist by prescription, and as both parties have joined in the prayer for this court to determine the level at which Fox may lawfully maintain the waters of his pond, the difficult task has been undertaken to ascertain the conditions which have existed during the twenty years preceding the commencement of this suit. The inquiry has necessitated the examination of a great number of witnesses touching early conditions, and, as may well have been anticipated, the testimony is in radical conflict in many respects. At the conclusion of the hearing the respective counsel joined in a request that I should view the premises and should also make independent investigations of my own, assisted by an engineer of my own choice, and a written stipulation of that nature has been filed. This unusual course has been adopted by reason of the extreme difficulty in ascertaining the exact truth touching many things concerning which the testimony was in conflict or was incomplete which could be accurately ascertained

by a view and measurements or demonstrations in my presence. I have accordingly visited the premises twice in the presence of respective counsel and have been assisted by a millwright of my selection employed by the respective counsel for that purpose. The investigations which I have made on the premises in dispute in the presence of respective counsel, have been of great service to me in determining the force to be properly given to much of the testimony, and while I somewhat doubt the propriety of pursuing this course in ordinary cases, I am fully convinced that it is the best course which could have been adopted in this case to insure the highest practicable degree of accuracy of conclusions.

The level at which Fox claims the prescriptive right to maintain the waters of the mill pond is marked on a horizontal string-piece which forms the top or cap of the wing of a bridge at the easterly end of the dam. This string-piece is not quite level and the water of the pond submerges the northerly end of the string-piece first. When the northerly half of the string-piece is submerged and the southerly half of the upper surface of the string-piece is still exposed, the water is at the level at which Fox claims it has been maintained for a working head during the twenty years next preceding the commencement of this suit. In the upper surface of the string-piece referred to, about midway between its ends, a nail is driven to designate the point at which the water of the pond will stand when at the working head claimed by Fox. A number of witnesses have testified touching this string-piece, and assert that it has been where it now is for more than twenty years, and that the level of the centre of the upper surface of that timber represents the level at which the pond has been held for working purposes during all of that time, whenever sufficient water could be held in the pond to maintain that level. Other witnesses assert to the contrary, and some testimony indicates that this string-piece was placed where it now is less than twenty years ago. It is urged that the abutment of the bridge with which the end of this string-piece connects was washed away within twenty years, and that any string-piece there at that time was necessarily removed or changed. A number of other witnesses fix the level of the pond during the past twenty years by

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the statement that the pond was always maintained, when sufficient water could be had, at about the level of what is known as the Dare lot. The Dare lot is the sideyard of a house known as the Dare house. This house stands near the southeast corner of the mill pond; the land between the pond and the house was the sideyard of the Dare house. The testimony of a number of witnesses is to the effect that the water has always been maintained at about the level of that sideyard; that the aim was to keep the pond as full as it could be without overflowing the Dare lot between the house and pond; that in freshets the lot would sometimes be overflowed before the flood gates could be raised. The part of the Dare lot referred to is now surfaced with gravel which has been placed there within a few years, but the amount of gravel placed there is in dispute. It is urged in behalf of Fox that but a few loads of gravel have been placed on the Dare lot. The surface of this gravel is now about the level of the water in the pond when the water is at the level of the nail referred to. Other witnesses have pointed out that back of the barn in the rear of the Dare house a "frog-pond" or "scow-hole" existed in the early days by reason of water flowing into it from the pond. With the water in the pond two inches below the nail I found the water running from the pond into this depression, at the time of one of my visits to the pond. A number of other witnesses, with various objects to assist their memory, were quite positive that for twenty years past and more the water of the pond has been maintained as high as it now is when at the level of the nail referred to. Other witnesses have been equally positive to the contrary. Along the course of the stream between the pond and the company's property above, dead cedar trees, standing with their roots and part of their trunks submerged with water, are pointed out as indicating that the trees could not have grown in water of such depth. On many of these trees the bark remains intact, and the testimony is that the bark of a dead cedar tree will not remain longer than ten or fifteen years. There are, however, similar dead cedar trees without bark. Photographs of the vegetation along the entire course of this stream have been introduced in evidence. It has also been shown in behalf of the company that the bridge,

already referred to, which passes over a canal at the easterly extremity of the dam, has been twice elevated. This canal leads to one of the mills of Fox—the saw mill—and supplies the water power for that mill. A road overseer testified that in 1896 he raised the bridge six inches by adding six inches of stone to the top of the stone abutments; on top of the stone which he added he placed a two-inch plank and the bridge was made to rest on the two-inch plank. That since then the bridge appears to have been raised six inches more by placing a six-inch plank on the two-inch plank. An examination of the bridge verifies the testimony of Mr. Albertson to the effect that, with the water in the pond at the level of the nail, the water at this time is at the level of the point of contact between the stone and the two-inch plank referred to. It follows that if the road overseer added six inches in height to the stone abutments and the water was prior to that time maintained at the level of the nail, it was maintained six inches above the stone work of the abutments. Testimony also exists to the effect that the dam has been raised during the past twenty years; but this is in turn denied. With the water at the level of the nail, it is about as near the top of the dam as it can be safely maintained; at worn places the water extends partly in the roadway which crosses the dam. Testimony also exists to the effect that the water did not formerly cause trouble at the bog of the company, but that it now operates to severely injure the bog.

As already stated, two mills are supplied with power by the waters of the pond. One is now operated as a saw mill and has been referred to. The other is a grist mill and receives its water through a flume or fore-bay passing through the dam some fifty yards or more westerly of the canal referred to. Formerly, each of these mills was equipped with an old-fashioned “undershot” or “low-breast” wheel. In 1889, less than twenty years before the commencement of this suit, these wheels were removed and turbine wheels were installed in their stead. The millwright who installed the turbine wheels testified that the working-head of the old wheels was four and one-half feet, and that he placed the new wheels for use with the same working-head. The “working-head” referred to represents the vertical distance between

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the level of the water in the tailrace, with the mill running, and the level of the water in the pond. An accurate measurement of the working-head of the grist mill discloses that with the water in the pond at the level of the nail referred to, the working-head is four feet ten and eight-tenths inches, or four and eight-tenths inches more than the working-head of the old wheels, if the millwright, who renewed the old wheels, was correct in his statement of the old working-head. Other witnesses also testified that four and one-half feet was the working-head of the old wheels. There can be no doubt of the accuracy of the measurements of the present working-head with the pond at the nail level. The measurement was twice taken—on different days—in my presence and in the presence of counsel, with both mills running at full capacity in order that the greatest possible amount of back water in the tailrace could accumulate. I do not regard this excess over four and one-half feet of working-head as conclusive evidence that the water, when maintained at the level of the nail referred to, is four and eight-tenths inches higher than it was used before the turbine wheels were installed, for the witnesses of Mr. Fox, who testified to the former working-head of four and one-half feet may not have been entirely accurate, but when taken in connection with other testimony and with features yet to be referred to, it is strongly indicative of a former level of the pond below that now claimed.

As already stated, a number of witnesses, who testified in behalf of Fox, stated that for over twenty years the pond has been maintained as high as it could be without overflowing the yard between the pond and the Dare house. To ascertain to what extent the Dare lot has been raised by the gravel referred to, three test holes were dug through the gravel at distant points into the soil below. The gravel was coarse, yellow gravel, packed and hardened, and the under surface of the gravel was almost as plainly marked as its upper surface. At the lines of demarcation, between the gravel and the soil below it, pins were inserted and levels were then run from the nail in the string-piece, which marks the level of the pond claimed by Fox as its ancient level to the three pins marking the bottom side of the gravel. The levels thus run, with a transit in my presence and in the presence

of counsel, disclosed that the bottom of the gravel at the first test hole was two and twenty-eight hundredths inches below the level of the pond; at the second test hole, three and forty-eight hundredths inches below the level of the pond; at the third test hole, three and ninety-six hundredths inches below the level of the pond. In other words, if the gravel should be removed from the Dare lot the water of the pond would, when maintained at the height claimed as its ancient height, be about three inches deep on the Dare lot between the pond and the Dare house. As this gravel was admittedly placed on the Dare lot in recent years, it is manifest that the pond could not have been maintained at its present level twenty years ago without flooding the Dare lot, if the bottom of this gravel can be accepted as the former surface of that lot, and the testimony is, as already stated, that the Dare lot has not been flooded, except in freshets occurring before the flood gates in the dam could be raised to lower the water.

Twenty years ago there stood at the edge of the mill pond in question an ice house in which ice from the pond was stored. The ice house is no longer there, but the "lifts" with which the ice was hoisted from the pond are still, in part, in place. The cakes of ice were floated onto these lifts and hoisted to a point at which they were deposited in the main ice house. The sill on which the lifts rested when down is still in place. The lifts were produced and offered in evidence as exhibits. As the testimony of witnesses touching measurements of the depth of water over these lifts differed, remeasurements were made in my presence. The depth of water above the upper surface of the sill, on which the lifts rested when down, was found to be twenty-six inches when the water in the pond was at the level of the string-piece nail. The lifts, two in number, are constructed with a bottom framework on which the cakes of ice rest; lateral uprights are secured to the bottom framework; these lateral uprights are connected by a horizontal cross-piece under which the cakes of ice must pass when floated on the lifts. The bottom frameworks of the lifts are one and three-quarter inches in thickness; the distance in the clear from the bottom framework to the cross-piece, is twenty and one-half inches. It will thus be seen that with

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the lifts resting on the sill above, referred to, ready to receive cakes of ice, the lower surface of the cross-pieces of the lifts, under which the floating cakes of ice would need to pass, would be three and three-quarter inches below the surface of the water of the pond if the pond was at the level contended for by Fox. It may have been practicable to operate these lifts with their bottom framework raised several inches above the sill to receive cakes of ice, and thus enable the floating cakes of ice to pass under the horizontal cross-piece, but as the lifts were operated by horse-power, I think otherwise. I think that the mechanism above described may be reasonably said to indicate that it was intended to conveniently receive ice from a pond in which the water was at least three inches below the height now asserted by Fox as the ancient height.

It is now necessary to refer to the construction of the two penn stocks. When the water of the pond is at the nail level referred to, the water in the penn stock of the saw mill is within a fraction of an inch of its top; where uneven places exist in the upper surface of the top sheathing planks of the penn stock the water overflows; no higher head of water could be utilized. At the grist mill the penn stock appears to have been originally constructed with a framework of eight by eight upright timbers resting on transverse sills of the same dimensions. At the rear end of the penn stock an eight by eight timber connects the upper ends of the two rear corner upright timbers. Inside of and against these upright timbers is the horizontal sheathing of the penn stock, the lateral sheathing extending to within one inch of the level of the top of the rear eight by eight horizontal frame or cap timber above referred to. On top of this rear eight by eight cap timber is a four by six timber. This timber operates to raise the height of the rear end of the penn stock four inches, and does not appear to have performed any office in the original construction. To raise the sides of the penn stock even with the top surface of the four by six timber a two by five sheathing plank is added. The effect of the four by six end timber and the two by five sheathing plank is to enable the penn stock to hold five inches more water than it could hold before these additions were made. It cannot be stated with posi-



tiveness that these additions were made since the penn stock was first constructed, but such is the appearance. With the water in the pond at the level of the nail referred to, the water in this penn stock of the grist mill is at the line of contact of the horizontal eight by eight and four by six, and is five feet seven and two-tenths inches above the bottom of the penn stock. This would be one inch above the top of the sides of the penn stock if the upper two by five sheathing plank were removed. It does not seem reasonable to suppose that these two open penn stocks would have been constructed with no margin of height above the level at which the water in the mill pond was intended to be maintained; the natural and reasonable inference is that the level of the water in the pond which these penn stocks were constructed to serve was lower than the level of the nail referred to which marks the working-head now claimed by Fox.

Another feature of the construction of the grist mill penn stock should be referred to. On the easterly side of this penn stock there is a horizontal framework timber extending from the second to the fourth upright eight by eight timbers referred to, and mortised into these two uprights. The intermediate eight by eight upright is mortised into the bottom of this horizontal framework timber. This horizontal framework timber is old and its upper surface decayed; the upper surface is eight inches below the level of the water in the pond when at the level of the nail referred to. While this timber may have formed a part of the upper framework of the old penn stock which has been superseded by the present one, I think that fact too uncertain to warrant any conclusion based on that assumption.

The testimony disclosed that the present turbine wheels which were, as heretofore stated, installed less than twenty years ago to take the place of horizontal undershot or low-breast wheels, economizes water to the extent of about twenty to twenty-five per cent. That is, the same power is obtained by the use of less water. As the testimony shows that it was found difficult to store enough water to hold the pond at or near the full head with the old wheels in use, it follows that with the new wheels performing the same duty as the old, the tendency would be to increase the level of the water maintained in the pond.

After a careful consideration of all the evidence, I am fully convinced that the level of the water in the pond, as it is now sought to be maintained, is higher than it was formerly maintained or used, and that the water has not been maintained or used at the present level for a period twenty years next prior to the commencement of this suit. I reached this conclusion from the evidence before I viewed the premises or made the independent investigations which have been referred to. The view which I made of the premises has fully confirmed that conclusion. But without a view of the premises I doubt whether I could have reached a satisfactory conclusion as to the amount which the water has been raised during the twenty years referred to. Using the information gained by a view of the premises in connection with the testimony taken at the hearing, I am now fully convinced that twenty years next before the commencement of this suit, the water in the pond was not and could not be maintained or used at a higher level than three inches below the level now claimed by Fox, which latter level is marked by the nail in the centre of the upper surface of the string-piece or cap wharf log at the southeast corner of the pond. This distance of three inches below the nail referred to will, in my judgment, represent with reasonable accuracy the level at which Fox has acquired a prescriptive right to maintain the water in the pond. There are so many features of the case which lead me to these conclusions that it seems impossible to escape them or to doubt their accuracy. The testimony touching the raising of the dam; the testimony touching the raising of the bridge to the level of the road on the dam; the construction of the old ice house lifts and the mechanism for their operation; the condition of the vegetation along the stream between the pond and the company's property above it; the height at which the back water from the dam causes the water to rise on the company's property; the level of the Dare lot below the gravel covering; the present working-head of the mills; the height of the penn stocks of the mills as at present constructed; the conservation of water by the present turbine wheels, all indicate an increased head of water, and many of the features named indicate an increase of head of about and not less than three inches.

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I will advise a decree fixing a point three inches below the level of the upper surface of the string-piece already described at the point where its surface is intersected by the nail referred to as the height at which the water in the pond may be lawfully maintained. Levels have been run from this nail to an elevation bench mark at Newfield, established by the Pennsylvania Railroad Company, and that bench mark has in turn been checked with elevation bench marks established by the United States government. I think it important that the level mark designated in the decree should be permanently fixed by checks of the nature referred to or by some other satisfactory method. If the respective counsel will agree upon the method of designation of the level to be specified in the decree, I will advise a decree so framed.

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JACOB MULLER

v.

ADON W. MULLER, administrator, &amp;c., of John Muller, deceased.

[Submitted October 4th, 1909. Decided October 14th, 1909.]

1. In a suit by one administrator against his co-administrator for the recovery of money alleged to be due complainant from intestate in his lifetime for services rendered and merchandise supplied, and also for the recovery of money paid by complainant for funeral expenses, upon a motion to strike out such portions of the bill as refer to such matter on the ground (1) of uncertainty, and (2) because within the jurisdiction of the orphans court, respectively—*Held* (1) that as the bill primarily seeks to establish a debt from the intestate to the complainant as administrator, which is disputed by his co-administrator, the suit is properly brought in this court; and (2) as respects the claim for services and merchandise the rules of equity pleading require complainant to give defendant full information in such a manner as to apprise him of the times when and the nature of the labor performed, and the kind and extent of the merchandise delivered, and when delivered, these being matters peculiarly within the complainant's knowledge, and of which defendant is presumptively ignorant.

2. Since rule 213 was adopted a motion against a bill for uncertainty is entertained of the same force as a demurrer upon like ground.

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On motion to strike out portions of bill.

*Mr. David O. Watkins*, for the complainant.

*Mr. Francis B. Davis*, for the defendant.

LEAMING, V. C.

This suit is brought by one administrator against a co-administrator for the recovery of money alleged to be due complainant from intestate in his lifetime; and also for the recovery of certain money paid by complainant for funeral expenses of intestate. Defendant moves to strike out the parts of the bill relating to the services and expenditures referred to and assigns for ground of the motion that the averments of the bill relating to money due from intestate in his lifetime are insufficient for want of certainty, and the parts of the bill relating to money due for funeral expenses are insufficient for the reason that the charges referred to may be adjudicated by the orphans court where settlement of the estate is pending.

As the bill primarily seeks to establish a debt due from intestate to the administrator, which debt is disputed by the co-administrator, the suit is properly brought in this court. *Petty, Administrator, v. Young*, 43 N. J. Eq. (16 Stew.) 654. The joinder of the claim for funeral expenses is proper for the reason that the jurisdiction of this court being properly invoked for the purposes named, this court may appropriately ascertain the entire indebtedness due from intestate's estate to complainant.

That part of the bill which sets forth the claim of complainant for money due from intestate in his lifetime is as follows:

• "That the said John Muller (intestate), in his lifetime, was indebted unto your orator in a large sum of money, to wit: the sum of four thousand, six hundred dollars, for nursing, board, washing and for goods, wares and merchandise furnished and delivered the said John Muller, in his lifetime, by your orator, at the special instance and request of the said John Muller, in his lifetime."

The motion against this portion of the bill is upon the ground:

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"That the said allegations do not specify at what period of time in the lifetime of the said John Muller he was indebted to the complainant in the sum of four thousand, six hundred dollars, nor how much of said sum is due complainant for board, how much for washing, how much for nursing nor how much for merchandise furnished."

It is a rule of equity pleading that the averments of the bill must contain a degree of certainty which will give to defendant full information of the case he is called upon to answer. *Mutual Life Insurance Co. v. Sturges*, 33 N. J. Eq. (6 Stew.) 328, 337; *Arnett v. Walsh's Executors*, 46 N. J. Eq. (1 Dick.) 543; 1 Dan. Ch. Pl. & Pr. \*368, and note to the effect that the rights of the several parties, the injury complained of, and every other necessary circumstance, as time, place, manner or other incident, ought to be plainly, yet succinctly, alleged. The objection that the bill is deficient for want of certainty may be taken by demurrer to the bill. 1 Dan. Ch. Pl. & Pr. \*368, \*372. Since rule 213 of this court has been adopted a motion against the bill for uncertainty is entertained of the same force as a demurrer upon like ground.

It is manifest that the test of sufficiency as to certainty must, in a large measure, depend upon the circumstances of the particular case. In the language of Lord Thurlow in *Phillips v. Phillips*, 4 Q. B. Div. 127, "It depends upon the good sense of the thing." Thus, in *Watson v. Murray*, 23 N. J. Eq. (8 C. E. Gr.) 257, it was held that averments in a bill which would ordinarily be objectionable for uncertainty were sufficient against the demurrer by reason of the fact that the bill was one for discovery, and that the matters touching which the bill was challenged for uncertainty were matters the source of information of which were entirely within defendant's possession. In the present case, the contrary condition exists, as this suit is for the recovery of money for services performed for intestate and for merchandise supplied to him in his lifetime, which are matters peculiarly within the knowledge of complainant, and of which the defendant is presumptively more or less in ignorance as to details. Under these circumstances, I think it is clear that the defined rules of equity pleading require complainant to give defendant full information of the case he is called upon to answer

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in such manner as to apprise him of the times when and the nature of the labor performed, and the kind and extent of the merchandise delivered, and the times when delivered.

A third objection to the bill is based upon an error in the bill which is conceded to exist and to be the result of inadvertence.

I will advise an order sustaining the motion against the bill and allowing complainant twenty days in which to file an amended bill.

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JOHN N. VARGO et al.

v.

ALEXANDER VAJO et al.

[Submitted April —, 1909. Decided May 20th. 1909.]

1. Evidence, in a proceeding to prevent the property of a religious society from being diverted from its original use, *held* to show that a meeting of the society, called to determine whether the society should continue to affiliate with the church organization with which it had formerly affiliated, or should connect itself with another society, was regularly called, and that all the proceedings which took place at such meeting were regular and in accordance with the course and practice of the society.

2. Where a meeting of a religious society is held to determine whether the society shall longer affiliate with the branch of the church with which it had formerly affiliated, or shall connect itself with another, and it is unanimously decided at that meeting to connect itself with another society, and no appeal is taken from such action to any higher judicatory of the church, such action is final, and a subsequent meeting of the society cannot disturb the decision.

3. Evidence, in a proceeding to prevent the diversion of church property from its original use, *held* to show that the Hungarian Evangelical Reformed Congregation of Trenton is only subject to the supervision of higher church authority in ecclesiastical matters, and that it has full control over its property, and cannot be restrained from reincorporating as the Magyar Reformed Church of Trenton, and transferring its property to the latter church and loaning money and placing a mortgage on such property.

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4. Where a meeting of a church society is regularly called and conducted, and the society determines at such meeting to terminate its connection with its superior church body and affiliate with another church, there being nothing to prevent such action in its charter, members of the society who do not agree with the majority lose any right which they may possess to bring an action to prevent the society from carrying out its resolution by failing promptly to commence an action, as laches will prevent them from securing favorable consideration in a court of equity.

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On final hearing on bill, answer, replication and proofs.

*Messrs. Bird & Blackman*, for the complainants.

*Mr. Alfred F. Skinner* and *Mr. Morris Cukor* (of the New York bar), for the defendants Vajo and others.

*Mr. Foster M. Voorhees*, for the Magyar Altalanos Hitelbank of Buda Pesth.

HOWELL, V. C.

The bill in this case is filed for the purpose of obtaining relief against a religious society incorporated by the name of The Magyar Reformed Church of Trenton, and against its officers, with respect to certain real estate and personal property which the complainants claim have been diverted from their original uses. The facts are voluminous. Some time prior to 1896 a number of Hungarians who resided at Trenton formed a voluntary society for the purpose of religious worship. This society was incorporated in that year by the name of the Hungarian Evangelical Reformed Congregation of Trenton, New Jersey, by the usual certificate signed by five trustees, duly acknowledged and recorded in the office of the county clerk of Mercer county. It was thereby certified that on the 26th day of April, 1896, the Hungarian Evangelical Reformed Church of Trenton, New Jersey, a congregation of christians of the denomination known as the Reformed Church in the United States, assembled at their house of public worship and elected trustees with a view of becoming incorporated according to law. For the first few years its affairs seem to have been satisfactorily conducted. It had

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some difficulty when there was a vacancy in procuring regularly-ordained clergymen who were competent to fill the pastorate and at the same time speak the Hungarian language. This class of clergymen could not be found in this country; they had to be brought over from the mother land. Yet the congregation prospered to such an extent that about two years after its incorporation it purchased two tracts of land by two deeds, of which the following are general descriptions. The first deed, was made on June 23d, 1898, by Edward Connelly and wife to

"The Trustees of the Hungarian Evangelical Reformed Congregation of the city of Trenton in the county of Mercer and State of New Jersey, a body corporate created and existing under and by virtue of the laws of the State of New Jersey, and being part of and connected with the Reformed Church in the United States."

The other deed was dated on June 25th, 1898, and was made by John Watson and wife to

"The Trustees of the Hungarian Evangelical Reformed Congregation of the city of Trenton, county of Mercer and State of New Jersey, a body corporate, created and existing under and by virtue of the laws of the State of New Jersey, and being part of and connected with the Reformed Church in the U. S."

Later on it acquired two other tracts, one by deed dated April 9th, 1900, made by Carrie W. Satterthwait to "The Trustees of the Hungarian Evangelical Reformed Congregation of Trenton, N. J.," and the other dated April 8th, 1905, made by John E. Wargo to "The Trustees of the Hungarian Evangelical Reformed Congregation of Trenton." These tracts of land were owned by the society at the time of the events hereinafter mentioned. Upon this land the society had in the meantime erected a church edifice and a parsonage, and there were also some other buildings on the premises which were let to tenants.

Prior to and at this time there was in existence a church judicatory called "The Reformed Church in the United States," which had some sort of ecclesiastical jurisdiction over a large number of churches. This judicatory was governed by a set of rules called the Constitution of the Reformed Church in the United States. The Trenton church became affiliated with this



judicatory on September 26th, 1899, and came under the ecclesiastical jurisdiction of the Philadelphia classis thereof, and from that time on for a number of years the Trenton church sent delegates to the annual meetings of the Philadelphia classis. There were many churches affiliated with the Reformed Church in the United States, which were composed of Hungarians, among whom only the Hungarian language was used. These churches petitioned the proper authorities of the Reformed Church in the United States for a direction that they be set off into a classis, to be called the Hungarian classis, but still under the ecclesiastical jurisdiction of the Reformed Church in the United States, and such proceedings were had that a Hungarian classis was organized to which the Trenton church was assigned and with which it became affiliated in June, 1905. This continued to be the situation of the Trenton church until the early part of 1907. It sent its delegates to the meetings of the higher judicatories; it recognized the jurisdiction of the Reformed Church of the United States over it, at least in spiritual matters, and it received annually a contribution from a board of missions which was associated with the Reformed Church in the United States, and was organized for the purpose of assisting its weak churches. This contribution was in the form of an annual addition to the salary of the pastor. The difficulty, however, of procuring properly educated ministers for their church still continued, and it became a subject of rather frequent conversation among the men who formed the consistory of the church and others who were its interested supporters.

There was, during all this time, a church organization in Hungary which was named the Universal Evangelical Reformed Church of Hungary. This appears by the testimony to have been and to be the highest judicatory of a denomination of Hungarian christians. In 1904, Count Joseph Dagenfeld visited the United States in the interest of this Hungarian body, and among the other churches that he called upon was the Trenton church, which he desired to have affiliated with the Hungarian body that he represented; his reason being that the Hungarian church was in a position to supply educated clergymen who spoke the Hungarian language, to the weaker churches in the United

States, and would also make larger contributions toward the support of the worshipping assembly than was being provided by the Reformed church. Little or nothing appears to have been done about the matter until the month of February, 1907, yet Dagenfeld's representations and promises were meantime much discussed by the members of the congregation. In February, 1907, the Rev. Alexander Vajo, who was the incumbent of the pastorate of the Trenton church, received a call from a church in Toledo, Ohio, which had a larger congregation and was perhaps a more important society than the one to which he was ministering. He communicated this fact to several members of his consistory, who casually met at his house on the evening of Saturday, February 16th, 1907. The meeting was purely informal, and is not claimed to have been a meeting of the consistory; but it was decided then and there that the pastor should on the following day, Sunday, February 17th, call a meeting of the consistory at the close of the church services in the afternoon of that day, and should likewise call a general meeting of the congregation to be held on Sunday, March 3d, both meetings, that of the consistory and that of the congregation, being called for the purpose of discussing two things—*first*, the call which the pastor had received from the Toledo congregation, and *second*, the question of dissolving the relations of the church with the Reformed Church in the United States and becoming affiliated with the Universal Evangelical Reformed Church of Hungary, the sole purpose of the latter being to have better facilities for procuring pastors when necessary, and also to obtain a larger degree of support than could be afforded by the agencies of the Reformed church.

On Sunday, February 17th, 1907, the pastor, in accordance with the custom of the church, announced that there would be a meeting of the consistory at the close of the church services. So far as I can see this meeting was regularly called. The by-laws provide that among the duties of the pastor is the duty "to summon the consistorial and congregational meetings and preside over them." There is no other specific by-law or rule on the subject. At that meeting there was a discussion of the matters for which the meeting was called, and it was decided,

without dissent, one at least of the complainants being present, that a general meeting of the congregation should be called, and that the Rev. Ladislaus Bede, who, in some way, represented the Hungarian church, should be invited to make an explanation of the plan of affiliation with that body. On the morning of that day there were posted on the doors of the church a notice, signed by the pastor and the treasurer, who is also called curator, calling a general meeting of the members of the congregation to be held on Sunday, March 3d, 1907, for the purpose, among other things, of discussing the proposition to join the Hungarian society. The meeting was likewise announced from the pulpit and the object of it stated by the pastor. On February 28th, 1907, there was a meeting of the consistory, which likewise appears to have been regularly called. The Rev. Mr. Bede was present. At this meeting it was decided by the consistory, without a dissenting vote, that the congregation should sever its relations with the Reformed church and should become affiliated with the Hungarian church, and that the whole matter should be submitted to the general meeting of the congregation which had already been called for Sunday, March 3d, 1907.

Besides the by-law above quoted there does not appear to have been any written rule in relation to calling meetings of either the consistory or of the congregation; a custom, however, was shown to have been in vogue in the Trenton church since its organization in relation to each. The pastor testified that his custom of calling the consistory together was, at the beginning of the church services to request the members of that body to remain after the service had been concluded, and that the method of calling congregational meetings was, for the consistory to pass a resolution for the purpose, then he, the pastor, would announce the meeting from the pulpit two weeks in advance, and a two weeks' notice was always posted on the front door of the church edifice. The absence from the constitution of the church of a specific method of calling these meetings must have been deemed to be a defect in the laws of the church, for the reason that the new constitution adopted in 1908 contains definite rules on the subject. The practice which was followed, however, is one which is prescribed in article 40 of the church constitution which was

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in force at the time for calling meetings for certain objects therein specified. It declares:

"All matters of this kind must first be investigated and determined by the Consistory and then be submitted for final decision to the congregation, a meeting of which shall be convened for the purpose by the Consistory on some suitable day."

In this case, the matter in question was acted upon at a regularly called meeting of the consistory by a unanimous vote and was then submitted to a general meeting of the congregation to be held on March 3d, which was called by a fair and reasonable notice. In pursuance of the notices given a large number of people who belonged to the congregation assembled after the regular church services on that day, some of the witnesses putting the number as high as three hundred. The pastor explained the situation to the congregation, and, among other things, he stated that he proposed to have the congregation vote on the question of affiliating with the Hungarian church, but that if there was one dissenting voice, so far as he was concerned, he would let the matter drop. .

There is evidence in the case to the effect that everyone of the complainants was present at that meeting, and that when the vote was taken, they voted in the affirmative. I find, as a matter of fact, that when the question was put by the pastor he called upon the people present to vote upon it by rising. When this call was made every person in the room stood up. In order to make sure of the fact the pastor appointed Joseph Horwath, the curator, and John E. Wargo to ascertain for him how the vote stood. They both say that they walked down the aisles between the benches to the rear doors, that they had an opportunity to see, and did see, whether everyone was standing or not; that they returned to the front of the church where the pastor was and reported to him in a loud voice which could be heard all over the church edifice that every person was standing—that is to say, that everyone who was present had voted in favor of affiliating with the Hungarian church. The testimony of the pastor, Mr. Horwath and Mr. Wargo to this effect is corroborated and supported by the testimony of several other witnesses, and

while the complainants contest this position, I am firmly of the conviction that all who were present either voted in the affirmative or remained seated and did or said nothing. After the affirmative vote had been taken the pastor testified that he called for the negative vote, and no one appearing to vote in the negative, he declared the resolution carried. John Bona, one of the complainants, testified that he attempted to speak, but that he was prevented from doing so by the pastor. The pastor explains this incident by stating that Bona did not attempt to speak until the close of the meeting when he was in the act of pronouncing the benediction; then, of course, it was too late. Up to this point, I think, the evidence shows very clearly that the meeting which was supposed to be the decisive meeting, the one held on March 3d, 1907, was regularly called, and that all the proceedings which took place at it were regular and in accordance with the course and practice of the religious body in question. I conclude that the vote was unanimous in favor of the secession from the Reformed Church of the United States. But assuming that the vote was not unanimous and that there was an objection made or a negative vote cast by the six complainants who were members of the congregation, would that be sufficient to invalidate the proceedings taken at the meeting? Assuming that there is a method by which this Trenton church could disconnect itself from the Reformed church and become affiliated with the Hungarian church, must it be upon the consent of every member of the church or by and with the consent of every member of the congregation?

It is very certain that immediately after the meeting objections were made which came to the ears of the pastor and the consistory, and was also called to the attention of the classis, which was the next higher judicatory of the Reformed church. It resulted in another general meeting of the congregation held at the close of the church services on April 7th, 1907. The Rev. Mr. Csutoros, the president of the Hungarian classis of the Reformed church, was present. He had come for the purpose of making explanations and endeavoring to ascertain what were the facts about the secession. For this purpose he put the question to the meeting anew. Four objectors arose, John N. Vargo,

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Mrs. Dubos, Mrs. Yatchi and John Bona. This meeting, however, was of no effect on the question at issue. That had already been decided. At a meeting of the whole congregation regularly called, there had been a unanimous vote in favor of the secession from the Reformed church and an affiliation with the Hungarian church, and no appeal was taken from the action of the congregation to any higher judicatory of the church.

The next question that arises is whether the Trenton church had an inherent right to so secede.

The complainants say that when once affiliated with the higher judicatory of the church, there can be no secession by any of the units without the consent of the supervising body. This claim makes it necessary to ascertain what the relations of the two bodies really were. The complainants urge that the certificate of incorporation and the two first conveyances to the corporation record the statement that the Trenton church belonged to the denomination known as the Reformed Church in the United States, and was a part thereof, and was connected therewith. These statements, however, were all made prior to the time when the church was actually received into the Philadelphia classis, and while it was an undoubtedly independent religious society. It has been held, as defendants' counsel has shown by cases cited in their brief, that such a situation creates a mere voluntary connection which may be broken at any time by a majority vote of the church. *Lawson v. Kolbenson*, 61 Ill. 405; *Heckman v. Mees*, 15 Ohio 584; *Miller v. Gable*, 2 Den. 492. In *Watson v. Jones*, 13 Wall. 679, the supreme court of the United States stated the law to be that where property had been acquired by an independent religious society, the court would not interfere with its disposition of its property. If there is anything in the constitution of the Reformed church which denies the right of secession without the consent of the supervising judicatory, then it would be the duty of this court to follow the ecclesiastical rule and not permit the secession to take place except in accordance with the laws of the church. If, however, there is nothing which prohibits such action on the part of the inferior body this court would not be justified in declaring the secession unlawful for the reason that there was no prohibition of such action. If, again,

the ecclesiastical laws permit this sort of action, then the court will not take cognizance of any proceeding which seeks to restrain the right of the individual church to control its own property. An examination of the constitution of the Reformed Church in the United States discloses the fact that the ecclesiastical judicatories of that church are—*first*, the consistory; *second*, the classis; *third*, the synod; and *fourth*, the general synod; and in relation to these bodies this fundamental law in article 24 provides as follows:

"These judicatories shall take cognizance only of ecclesiastical matters; their power is wholly spiritual; they possess the right of requiring obedience to the laws of Christ and of punishing the disobedient by excluding them from the privileges of the church, but not by the infliction of any civil penalties."

By article 40 the jurisdiction of the consistory, which is the lowest judicatory, is defined. It is as follows:

"To the Consistory as such belongs the choice of delegates to represent it in the higher judicatories of the church and the management and control of the temporal concerns of the congregation. In the calling of a minister, the judging of a minister or other officers of the church, the purchase or sale of property, the Consistory can determine nothing conclusively without the consent of a majority of the congregation present. All matters of this kind must first be investigated and determined by the Consistory and then be submitted for final decision to the congregation, a meeting of which shall be convened for the purpose by the Consistory on some suitable day."

The jurisdiction of the classis does not include the management and control of the church property, but does include whatever concerns the spiritual welfare of the several congregations committed to their care which does not come within the power of a consistory. They decide cases which are brought before them by appeal or complaint from consistories as well as all cases respecting either ministers or congregations which may arise within their jurisdiction and are regularly brought before them, such as the forming of new congregations, the determining of their boundaries when they are contested, the decisions of controversies between existing congregations, and the forming or dissolving of connections as may be requested or

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the classis may deem expedient. The synod and the general synod do not appear to have any jurisdiction over the church property at all. In view of the provisions of the twenty-fourth article of the constitution and the absence of any prohibitory mandate in the fundamental church law, I conclude that the government of the Reformed Church in the United States was not Episcopal or Presbyterian in form, but that it was congregational to the extent that each worshiping unit had the absolute control of its own property, and that its connection with the main body was merely spiritual, disciplinary and doctrinal. The express renunciation of all other connections by the terms of the twenty-fourth article necessarily lead to this conclusion. The two experts in the ecclesiastical law of the Reformed church, who were called as witnesses, both stated that there was not any express rule forbidding secession.

It is argued on behalf of the complainants that the expressions made use of in the certificate of incorporation of the Trenton church, and in the two deeds of conveyance to it, are sufficient in themselves to create a trust in favor of the denomination known as the Reformed Church in the United States. As to the expression in the charter, I think that that was used merely for the purpose of stating what denomination of christians the church members belonged to, and as to the expressions in the deeds, it is quite clear that they were at the time not true, because the Trenton church was not received into the Philadelphia classis of the Reformed church until a considerable time after these deeds had been executed and delivered.

The evidence shows that after the meeting of March 3d, 1907, there was no change whatever in either the form or the substance of the religious teachings or of the doctrines to which the members of the congregation adhered. There was no dismissal of the pastor nor any break in the relations between him and the congregation. The congregation continued its identity unchanged and unbroken, except that the complainants and certain of their friends declined to recognize the change. The main body of the people comprising the congregation continued to worship in the same manner as theretofore, and in all respects the situation was unaltered, except that the congregation con-



sidered itself affiliated with the Hungarian church and no longer with the Reformed church. The case comes within the rule announced by the supreme court in *Pulis v. Iserman*, 71 N. J. Law (42 Vr.) 408. There the question was whether there might be lawfully a secession by the Paramus church from the classis of the True Reformed Dutch Church. Mr. Justice Dixon says, in the opinion, that inasmuch as the constitution of the True Reformed Dutch Church contained no explicit declaration on the subject of secession, it must be regarded as permitting that right, and, pursuing the subject, he says: "That the Paramus congregation, when, by unanimous vote, it separated from classis and synod, did not *ipso facto* lose its congregational or corporate character is a proposition supported by the decisions in *Doremus v. Dutch Reformed Church*, 3 N. J. Eq. (2 Gr. Ch.) 332, and *Den v. Pilling*, 24 N. J. Law (4 Zab.) 653, and if, as we think, it thereby exercised its right of secession, it became an independent congregation. The authority of classis and synod over it being thus terminated, the subsequent attempts of classis to reconstruct that congregation or to transfer its franchises to a new congregation were futile." And the result was that the church which so seceded from the True Reformed Dutch Church was permitted to become a Presbyterian church under the care of the Presbytery of Jersey City.

Much reliance is placed by the complainants on the authority of *Den v. Bolton*, 12 N. J. Law (7 Halst.) 206. That case cannot be regarded as any authority for the present one because the chief-justice states in the beginning of his opinion that the case did not require the court to consider or decide what was the effect upon the joint property of a religious society of the withdrawing of the whole or a portion of its members either with or without a change of doctrine and their union with some other religious denomination or their formation of some new sect or some new ecclesiastical arrangement, nor whether those who thus change or withdraw carry with them any portion of the common funds, thus omitting from consideration the very things which are of paramount importance in the case at bar.

Counsel for complainants considered that *Rosh's Appeal*, 69 Pa. St. 468, was decisive of the question of the right to secede.

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A careful examination of the case, however, shows that the proceeding was taken for the purpose of enforcing an express trust which was impressed upon the land in question in the deed by which the church took title from the individual who had donated the same and devoted it to a particular use. Whatever is said in that case about the right of the secession must be limited to the particular facts under which that question of law was presented.

After the meeting of April 7th, 1907, nothing was done by either party looking to a reconciliation of their differences. The consistory and trustees then in office remained in office until the midsummer of that year, when a new consistory was elected, which thereafter took steps to carry out the proposed union with the church in Hungary. Meantime the complainants lay still and did nothing to prevent affirmative action on the part of the new consistory and trustees. The things which were done in that direction and for that purpose must have been known to the complainants. Indeed, I can hardly conceive how any important transaction could be had by the prevailing party in relation to church action which could have escaped their vigilance. There is, it is true, no evidence which tends to show that they had actual knowledge of these subsequent transactions, but I think it is fair to assume that they could hardly have taken place without some hint coming to the ears of those objectors.

Up to this time the church was indebted to the Mercer Trust Company, on its promissory note, for a loan of \$1,300, and to one Grumholz, on a mortgage, for \$1,700, making \$3,000 in all; about the midsummer of 1907 the consistory had an opportunity to purchase a piece of land adjoining the church property from Mrs. Martha L. Moore. On August 11th, there was a meeting of the congregation at which the pastor stated that the Moore property could be bought for \$5,050, but that in order to make the purchase it would be convenient that the church should procure a loan of \$8,000, and so fund the said indebtedness and the cost of the Moore property into one loan; that this loan could be had from the Magyar Altalanos Hitelbank of Buda Pesth, Hungary, one of the defendants to this suit. This purchase and the loan were authorized at that meeting. On September 1st, 1907, at a meeting of the consistory, the pastor reported the purchase

of the Moore property; that \$50 had been paid in advance thereon, and that \$200 more was paid on August 27th, and that the balance of \$4,800 must be paid by the 1st of November; that for the purpose of procuring the loan a new charter would have to be procured which would bind the church to the Hungarian body, and that the property should be transferred to the corporation thus to be organized. In order to effectuate this step the consistory provided for another congregational meeting to be held on September 8th. At this meeting the pastor stated the necessity of a new charter in order to effectuate the loan, and that it would be necessary to transfer the property to the new corporation; he proposed that the scheme be adopted by the congregation, and that five new trustees should be elected to carry out the plan. The congregation unanimously affirmed the plan and elected as trustees, John E. Wargo, John Pandek, Andrew J. Duch, Alexander Kovach and Andrew K. Wargo. I repeat that these public events could hardly have taken place among the Hungarians in Trenton without being heard of by the complainants. They permitted the new charter for a new corporation to be filed on October 3d, and by it the Magyar Reformed Church of Trenton to be organized; they permitted the trustees of the Hungarian Evangelical Reformed Church of Trenton to convey its church property to the Magyar Reformed Church of Trenton by deed dated October 1st, 1907, which was acknowledged and recorded on October 7th, 1907. They permitted the Magyar Reformed Church of Trenton to purchase from Martha L. Moore a tract of land adjoining their property by deed dated October 31st, 1907, for the consideration of \$5,050; and they permitted the Magyar church to borrow from the Hungarian bank, through the agencies of the Hungarian church on bond and mortgage on all their church property, the sum of \$8,000, a portion of which was used to pay off the indebtedness to Grumholz and the Mercer Trust Company, and the remainder for the purchase of the Moore property. And I say again that these facts must have been known to the complainants, or some of them, because it is in evidence that they, or perhaps a majority of them, attended the church from time to time and called upon the pastor to assist at their weddings and funerals.

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In my opinion, if the complainants ever had any cause of action arising out of the facts in this case they lost their right to bring a suit thereon by their inaction after March 3d, 1907. If they had, or considered that they had, a cause of action arising out of the circumstances of the meeting which was held on that day, they should at once have prosecuted the same, and to delay and permit the important transactions above recited to be closed without so much as making inquiry as to what the defendants intended to do, or what they were doing, is such laches as disentitles them to favorable consideration in a court of equity.

It should perhaps be stated that after the organization of the new corporation (the Magyar church) the identity of the congregation continued; it consisted of the same persons; it was governed by the same rules and adhered to the same doctrines, and was ministered to by the same pastor as formerly.

The defendants also claim that the six complainants have, by their participation in the proceedings complained of, so far acquiesced as that they ought not now to be heard in opposition. John Noai Vargo was a member of the consistory, attended the meeting of February 17th, and there voted to join the Hungarian church; he repeated this action on February 28th, and the weight of the testimony is that he was at the meeting of March 3d and either voted in favor of the secession or remained silent. John Bona was present at the meeting of March 3d and either voted in favor of the proposition then pending or remained seated. The same may be said of John Scoke, of Joseph Kovach, of George Dubos and Andrew K. Duch. There is some denial of these allegations, but the weight of the testimony is in their favor. Indeed, it was said at the meeting of April 7th, when John Noai Vargo expressed his dissent from the action that had been taken, that he had voted for the proposition on March 3d, and he said in response that he had changed his mind. Some of the complainants have either actually or practically withdrawn from the suit. John Scoke says in his testimony that he was not suing, that they only called him to a notary public because he knew how the church was built, but that he did not sign to sue and that he never would sue. Joseph Kovach and Andrew K. Duch have actually withdrawn from the suit by

paper-writings which were put in evidence. Then there is the further fact that these men are mere dummies whose names are being used by the Reformed Church in the United States in an attempt to hold under its jurisdiction the valuable property which the Trenton church has acquired. This appears in the testimony of John Bona. There are many other difficult and important questions in the suit which I do not find it necessary to decide. One is the relation which the five trustees who were elected on September 8th bear to the present organization, it being argued, on the part of the Hungarian bank, that the case of *Doremus v. Dutch Reformed Church, 3 N. J. Eq. (2 Gr. Ch.) 332*, goes to the extent of holding them in office, whatever may happen to the other branches of the transaction. Another question is whether the church property of the Trenton church was transferred to the Magyar church by the deed of October 1st, 1907; that is, whether Joseph Horwath, who signed as president, was authorized to execute the deed. Another is perhaps whether the mortgage to the Hungarian bank is a valid lien upon the church lands from a legal standpoint. These questions are not of importance to the present suit under the view that I have taken of the main part of the case. If the persons who were elected as trustees on September 8th were actually such trustees, I do not understand how Mr. Horwath could have authority to sign the deed.

The result is that the bill should be dismissed, with costs, and I will so advise.

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PAULINE S. VON BERNUTH

v.

FREDERICK A. VON BERNUTH, JR

[Submitted June 8th, 1909. Decided June 17th, 1909.]

1. Events happening after the bringing of the original suit are interjected into it by leave of the court by supplemental bill or answer, and, as to the facts set up therein, they relate to the dates of happening thereof.

2. A husband may be enjoined from maintaining in another state an action for separation instituted subsequent to the commencement in New Jersey of a suit for divorce by his wife and his appearance and answer therein, where his action is vexatious and harassing to her, and, if the two causes are allowed to proceed, will undoubtedly be embarrassing to the courts of both states, and likewise on the general ground that the cause of action was within the jurisdiction of the New Jersey court before any attempt was made to compel the wife to submit to a foreign tribunal, and where such injunction will not contravene the public policy of such other state.

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On petition for divorce. Motion for injunction.

*Mr. Thomas L. Raymond*, for the motion.

*Mr. Clinton H. Blake, Jr.* (of the New York bar), and *Messrs. Sommer, Colby & Whiting*, contra.

HOWELL, V. C.

This is a motion for an injunction to restrain the defendant from further prosecuting an action in the supreme court of New York. On October 5th, 1908, the petitioner filed her petition in this court praying for a divorce against the defendant upon the ground of desertion. This petition was subsequently amended and citation thereon was issued and returned by the sheriff not served. An attempt was then made to secure the appearance of the defendant, who was residing in the city of New York, by substituted service. The order for publication

of the substituted notice was made on November 25th, 1908, and the time for answer appointed thereby expired on January 26th, 1909. On January 20th, 1909, counsel for the defendant took an order that he have twenty days additional time in which to file an answer or demurrer to the amended petition. On February 13th, 1909, another order was made on motion of defendant's counsel extending the time to answer or demur twenty days further. On February 24th a general appearance was entered for the defendant by one of the solicitors of this court, and on the same day he filed an answer denying the allegations of the amended petition. On March 1st, 1909, he again appeared by counsel to oppose a motion for alimony, and on May 5th, 1909, he filed an amended answer and a cross-petition for an absolute divorce against the petitioner, alleging as the ground thereof her desertion of him. These are all the proceedings in the New Jersey suit which it is of importance to set out.

On March 17th, 1909, the defendant brought an action in the supreme court of New York against the petitioner by the issue of a summons out of that court directed to the petitioner herein and entitled "action for a separation." On March 23d, 1909, that court made an order for substituted service on the petitioner; the summons, with notice of the order, was served upon her on March 24th, 1909. This required her to file her answer in the New York suit on or before April 23d, 1909. The petitioner moves upon petition and affidavits showing these facts to restrain the defendant in the New Jersey action from further prosecuting his action in New York upon the grounds—*first*, that this court having obtained jurisdiction of the matrimonial status of these parties and of the causes of action between them, is entitled to proceed to a determination of the issue, and *second*, that the action of the defendant in New York is vexatious and is designed only to hinder and harass the petitioner in her prior action in New Jersey, and to cause her the expense and labor incident to the trial of one issue in two separate actions.

The suit in this court in favor of the wife, and the defendant's appearance and answer thereto, were prior in date to the beginning of the New York action. The New Jersey suit relates to

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the situation as it was at the date of its beginning. The amendment to the petition relates back to that date, and the defence, by way of answer, speaks as of the same date. At the time of the filing of the petition herein the wife claimed that she had a cause of action against her husband for a desertion which began more than two years before. The husband, by his cross-petition, claims to have cause of action against the wife for a desertion which began more than two years before the filing of the cross-petition. The evidence in each case must include all the acts and doings of both parties during the period of desertion alleged. To illustrate, on the issue made on the original petition and answer, it will be competent for the defendant to bring out matrimonial misconduct on the part of the petitioner as a bar to her action, and if the New York suit were to be tried, the petitioner, by way of defence, would be permitted to set up a matrimonial offence committed by the defendant in bar of his New York suit. The fact that the original petition and the cross-petition in this court with their respective answers are heard together makes no difference as to the evidence. The adjudication in the New Jersey suit must be made on these pleadings, and while the decree will settle the rights of the parties as of its date (*Peck v. Goodberlett*, 109 N. Y. 180; *Randel v. Brown*, 2 How. (U. S.) 406), no decree at all could be made unless the parties respectively had causes of action which related back to the earlier dates mentioned. Events happening after the bringing of the original suit are interjected into it by the leave of the court by supplemental bill or by supplemental answer, and when these go in the adjudication as to the facts set up therein, will relate to the dates of the happening thereof.

The defendant in his cross-petition in this suit alleges that the petitioner, without any cause or justification whatever, and without any fault on his part, wrongfully, willfully and obstinately abandoned and deserted him, and that for more than two years then last past she had willfully, obstinately and continuously deserted him, and he prays that he may be divorced from his wife and be awarded the custody of his children. In the complaint filed in New York the defendant alleges that the petitioner deserted him without any justification whatever and



with intent not to return to him, and abandoned him, and that she had been willfully and continuously absent from him for a period of more than one year last past; and he prays for a judgment of separation from the bed and board of the petitioner, and that the court may award to him the custody of his children. The basis of the action in each case is the desertion. The relief prayed for in each case is founded on the allegation of the fact of desertion. This court obtained possession of that cause of action on the day of the filing of the original petition, and the petitioner insists that for this reason this court should continue to hold the cause and should adjudicate every matter which might by the course and practice of this court be adjudicated between these parties. She likewise claims that the New York action is vexatious and is intended to hinder and harass her in the prosecution of her suit in this court. The defendant maintains that the cause is one governed by the ordinary rules and that it is entirely proper for him to have two suits pending for the same cause of action in two different states at the same time, and that the pendency of one cannot be pleaded in bar to the other. While there is nothing in the case to show that the defendant had in his mind any intent to embarrass the petitioner, his New York action has that effect. She is called upon in this court to defend a suit for an absolute divorce on the ground of desertion. She is called upon in New York to defend against a prayer for a limited divorce founded upon the same general cause of action. She is notified in the New Jersey case to defend against a desertion which is alleged to have taken place on March 19th, 1907, and in the New York case to defend against a desertion which is alleged to have taken place on July 3d, 1906. She is put to the expense and trouble of defending two actions, when the defendant might have all the relief to which he is entitled, and more than he asks for in New York, by litigating the cause pending in this court. This is undoubtedly vexatious and harassing to the petitioner, and if the two causes are allowed to proceed will undoubtedly be embarrassing to the courts of both states. If, therefore, there exists in the law any proceeding by which this vexatious action of the defendant may be prevented, such proceeding should be applied to this case.

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This raises the question of the power of this court to enjoin persons who are under its jurisdiction from prosecuting actions in the courts of foreign states. Almost the final word was said upon the subject by Lord Brougham in *Portarlington v. Soulby* (1834), 3 M. & K. 104, but the point has also received much attention in the courts of this state. In *Home Insurance Co. v. Howell* (1873), 24 N. J. Eq. (9 C. E. Gr.) 238, the facts were these: The Home Insurance Company issued policies of fire insurance to the defendant, Howell, a resident of Illinois, insuring his property in this state. The bill alleged that the defendant had procured the policies by fraud and prayed that they might be declared void and be delivered up to be canceled, and the defendant enjoined from bringing any action at law upon them. The defendant was actually served with process in this state, and so came within the jurisdiction of this court. He filed his answer, to which the complainant filed a replication. In the meantime the defendant brought a common law action in a state court in Illinois upon the policies, which action the complainant removed to the United States circuit court upon the ground of diversity of citizenship, and then moved this court for an injunction to prevent the defendant from prosecuting his common law action in the federal circuit. Chancellor Runyon granted the injunction; the argument on the point was had on a motion to dissolve it. The chancellor held the injunction upon the sole ground that this court had first obtained jurisdiction over the controversy, and was therefore entitled to hold possession of it for final disposition. Speaking of the subsequent suit in Illinois, he says: "If bringing the suit at law was not a contempt of this court under the circumstances, it surely was a proceeding which this court will discountenance." The case was cited subsequently with approval in *New Jersey Zinc Co. v. Franklin Iron Co.*, 29 N. J. Eq. (2 Stew.) 422. The next reported case is *Kempson v. Kempson* (1899), 58 N. J. Eq. (18 Dick.) 94, in which this court enjoined a husband whose residence was in New Jersey from prosecuting a suit for divorce against his wife in a foreign state, upon a satisfactory allegation of fraud, which consisted of the husband's allegation that he was a resident of such foreign state, whereas as a matter of

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fact he was a resident of New Jersey. In this case the jurisdiction was exercised upon the ground of fraud, and upon the further ground that the wife was put to the trouble and expense of appearing in a foreign state to resist her husband's claim, thus making the foreign proceeding a vexatious one. In the same year occurs the case of *Huettinger v. Huettinger* (1899), 43 *Atl. Rep.* 574, in which Vice-Chancellor Grey, following *Kempson v. Kempson*, enjoined the husband from prosecuting a suit for divorce in a foreign state, the ground being the fraudulent representation by him of his residence in such foreign state. In both these cases this court claimed jurisdiction over the defendant upon the ground that he was a *bona fide* inhabitant of this state. A similar injunction was ordered in 1899 in *Streitwolf v. Streitwolf*, 58 *N. J. Eq.* (13 *Dick.*) 563, 570.

The next case that occupied the attention of this court is *Margarum v. Moon* (1902), 63 *N. J. Eq.* (18 *Dick.*) 586. In that case the court enjoined a resident of this state from prosecuting an attachment in a foreign state against his debtor, who was also a resident of this state, for the purpose of evading a law of this state and obtaining in the foreign jurisdiction an advantage which he would not have under the New Jersey law. The opinion is by Vice-Chancellor Reed. He cites the leading cases of *Cole v. Cunningham*, 133 *U. S.* 107, and *Keyser v. Rice*, 47 *Md.* 203, which has since been affirmed and extended by *Miller v. Gittings*, 85 *Md.* 601; 60 *Am. St. Rep.* 352, and places his judgment upon the ground of the unjust advantage gained by the creditor by the prosecution in the foreign state. In *Standard Roller Bearing Co. v. Crucible Steel Company of America*, 71 *N. J. Eq.* (1 *Buch.*) 61, Chancellor Magie enjoined a proceeding in the courts of a foreign state upon the ground that such proceeding had the effect of harassing and oppressing the defendant therein. Finally, there is the case of *Bigelow v. Old Dominion Copper Mining and Smelting Co.*, 74 *N. J. Eq.* (4 *Buch.*) 457, in which Chancellor Pitney declares that the power of this court to restrain persons within the control of its process from prosecution of suits in other states is clear, but holds that upon grounds of comity it should be sparingly exercised. He denied the injunction in that case upon the ground that there the for-

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eign court, being a court of general jurisdiction, had full jurisdiction of the case in question which it had acquired several years before the New Jersey action was begun.

Attention has been called to the foregoing New Jersey cases merely for the purpose of showing the grounds upon which the jurisdiction has been exercised in this state. An examination of the general subject will disclose the fact that the courts have exercised the jurisdiction in cases where the foreign action operates to the substantial detriment of the resident, not only where the claim is equitable, but also where it is legal. In *Harris v. Pullman*, 84 Ill. 20; 25 Am. Rep. 416, the jurisdiction was put upon the ground that it was inconsistent with interstate harmony that after a suit had been commenced in one of the states, the prosecution thereof should be controlled or interfered with by the courts of another state. In *Sandage v. Studabaker*, 142 Ind. 148; 51 Am. St. Rep. 165, it was put upon the ground that the foreign suit could not be instituted for the purpose of evading the laws of the state in which the plaintiff lived. In *Keyser v. Rice*, 47 Md. 203; 28 Am. Rep. 448, it was put upon the ground of oppression and vexation. In this case the necessity for the exercise of the jurisdiction is very clear. The facts bring it within that class of cases which permit injunctions to issue to restrain foreign actions on the ground of oppression and vexation, and likewise upon the general ground that the cause of action was within the jurisdiction of the court appealed to before any attempt was made to compel the petitioner to submit to a foreign tribunal. In *Miller v. Gittings*, *supra*, an injunction was issued in favor of a resident of Maryland against his creditor, also a resident of that state, to restrain the creditor from pursuing the debtor in the New York courts by process of arrest, a remedy which he could not have in their home state. The case is thoroughly considered and contains a valuable collection of cases on the subject. In *Dehon v. Foster*, 4 Allen 545, the supreme court of Massachusetts enjoined a citizen of that state from prosecuting a debtor by attachment in Pennsylvania because the effect of allowing the attachment suit to go to judgment would be to give the attaching creditor a preference over other creditors and so defeat the operation of the

Massachusetts Insolvent law. In *Hawkins v. Ireland*, 64 Minn. 339; 58 Am. St. Rep. 534, a citizen of Minnesota was restrained from prosecuting an action in a foreign state where it was necessary to prevent one citizen from obtaining an inequitable advantage of another. In Vermont it was declared that the jurisdiction would be exercised in that state only when the ends of justice and not the convenience of parties required it. *Bank of Bellows Falls v. Rutland Railroad Co.*, 28 Vt. 470. In Indiana an injunction issued where the attempt was made to enforce a claim in a foreign jurisdiction in such a manner as would deprive the debtor of his exemption under the laws of Indiana. *Wilson v. Josephs*, 107 Ind. 490. The same doctrine was held in Ohio in *Snook v. Snetzer*, 25 Ohio St. 516, and in Wisconsin, *Griggs v. Doctor*, 89 Wis. 181; 46 Am. St. Rep. 824.

The restraint sought for by the petitioner does not impugn the policy of the State of New York, for the reason that the rule which prevails in New Jersey on this subject also prevails there. Indeed, Chancellor Runyon based his opinion in *Home Insurance Co. v. Howell*, *supra*, largely on the early New York case of *Mead v. Merritt* (1831), 2 Paige 402. The doctrine has since been applied in numerous cases. *Newton v. Bronson*, 13 N. Y. 587; *Gardner v. Ogden*, 22 N. Y. 327; *Stevens v. Central National Bank*, 144 N. Y. 50. See, also, *Kittle v. Kittle*, 8 Daly N. Y. 72. It therefore appears that the power which is invoked actually inheres in this court, that the present case is one in which it should be exercised, and that the exercise will not contravene the public policy of the State of New York.

An injunction will therefore issue against the defendant to restrain him from the further prosecution of his suit in the supreme court of New York against his wife for a separation.

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WALTER M. JACKSON

v.

HORACE E. HOOPER et al.

[Decided July 10th, 1909.]

1. While a business carried on by two or more persons for a profit, with a community of interest, and a share of profits and losses, is essentially a "partnership," these requirements may exist without creating a partnership, and there can be no partnership unless the agreement contemplates an agency whereby each is the agent for the other or others.

2. A "joint adventure" may exist where persons embark in an undertaking without entering on the prosecution of the business as partners strictly, but engage in a common enterprise for their mutual benefit; they each have the right to demand and expect from their associates good faith in all that relates to their common interests.

3. Though there is a distinction between a partnership and a joint adventure, they are of a similar nature, and the rules of law applicable to partnerships apply to joint adventures, and equity will wind up a joint adventure because of misconduct of one of the parties and for an accounting, and in case of disagreement either party may sue for the dissolution of the agreement, and obtain an injunction to protect his rights.

4. A contract establishing a joint adventure need not be express, but may be implied from the conduct of the parties.

5. The parties to a joint adventure must act with the utmost good faith towards each other.

6. Complainant and defendant, engaging in business with third persons, bought out the third persons, and then organized a corporation and carried on the business by their joint direction. They were equal stockholders in the corporation, and they managed it jointly with the aid of employees. Instead of dividends, they drew profits from the bank accounts of the business; each drawing substantially equal amounts. This corporation was liquidated and other corporations formed. They were equal holders of the stock of the new corporations; but to comply with the law a few shares were put in the names of two other persons. Defendant stated in a letter that the whole business was one concern. The receipts from the business, which was conducted in various countries, were deposited indiscriminately in the same banking accounts from which expenditures were made generally. The funds received from every source were deposited in banking accounts kept in different names, but were subject to withdrawal by complainant and defendant.—*Held*, that complainant and defendant were parties to a joint adventure and were not partners.

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On motion for preliminary injunction.

*Messrs. Lindabury, Depue & Faulks and Mr. Sherman L. Whipple* (of the Massachusetts bar), for the complainant.

*Mr. Robert H. McCarter, Messrs. Wollman & Wollman and Mr. Henry W. Taft* (of the New York bar), *Mr. Benjamin V. Becker and Mr. Jacob Newman* (of the Illinois bar), for the defendants.

HOWELL, V. C.

The theory of the bill in this case is that Walter M. Jackson and Horace E. Hooper are and for a number of years have been partners in business. The bill is filed for the purpose of dissolving the partnership and for an accounting of all the partnership affairs. It also prays for an injunction to restrain the defendants, Horace E. Hooper, Harris B. Burrows, Charles C. Whinery and Franklin H. Hooper from transferring or disposing of some shares of stock standing in the names of the said Harris B. Burrows, Charles C. Whinery and Franklin H. Hooper, on the books of two corporations, one an English corporation and the other a corporation organized under the laws of the State of Illinois; and also from withdrawing from the so-called partnership business any moneys for the private use of any of the defendants, and from interfering with the assets thereof, except in the regular course and in the ordinary conduct of the business, and from excluding the complainant from participation in the conduct of the business.

The bill alleges that prior to the year 1900 the complainant, Jackson, and Horace E. Hooper had been associated with James Clarke and George Clarke in the business of selling subscription books in England; that they purchased the Clarke interest in that business in March, 1900; that at that time an agreement was entered into between Jackson and Hooper which is set out in the bill as follows:

"That upon the acquisition of the Clarke interests and so long as they might be associated together in business, their general policy in respect to their joint undertakings should be determined by mutual assent; that

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nothing should be done by either in connection therewith contrary to the wishes or against the interests of the other; that in respect of their said business enterprises, their ownership interests and authority and control in management should be on a basis of exact equality and that each should have and exercise the authority and control of equal partners; a further proviso being agreed upon to the effect that either might act alone in the routine conduct of the business in the absence of the other."

The bill further states that Jackson and Hooper carried on an extensive and very profitable subscription book business from 1900 until near the end of 1908; that a part of the business was conducted and carried on under the individual names of the complainant and the defendant Horace E. Hooper, and a part by the use of trade names assumed or acquired for the purpose; that a part of the business was conducted by them directly as individuals and other parts in the names of corporations organized by them for the purpose, and also through the agency of other individuals, but that their more important engagements and undertakings were made in their own names; that during this period the complainant and Hooper acquired the copyright and trade name of the Encyclopædia Britannica, the title to which was taken in their individual names, and that the business relating to the sale of the encyclopædia to individual customers was conducted in the name of some newspaper like the "London Times," or under some trade name adopted by them; that the accounts in the early history of the business were kept in the books of the Clarke Company, Ltd., but that the banking accounts in which were deposited the receipts from all their business were kept indiscriminately at that time either in the name of Jackson or Hooper or Clarke Company, Ltd., and that these accounts were subject to check by either Hooper or the complainant, and that each drew therefrom at will for his private use.

The bill further states that in order to avoid the provisions of the English Tax law, it was determined, in 1902, to liquidate the Clarke Company, Ltd., and to organize in its place two other companies, one under the English law, to be called Hooper & Jackson, Ltd., to transact business in Great Britain, and the other under the law of the State of New York, to be known as



the Encyclopædia Britannica Company, to transact the other business in which the complainant claims that he and Horace E. Hooper were engaged; that the complainant and Hooper were equal holders of the stock of these corporations, and are now equal holders of the stock of the English corporation; that in 1903, for reasons of convenience not now necessary to be stated, the complainant and Hooper organized a corporation under the laws of the State of Illinois, which they called the Encyclopædia Britannica Company, and which will hereafter be mentioned as the Illinois corporation; that this corporation issued its stock to the complainant and Hooper in equal shares, and they have owned and now own all the shares of that corporation, each being entitled to an equal number; that it became necessary to have other shareholders in these two corporations in order to comply with the provisions of the English and the Illinois law, and for this purpose four shares of the Illinois corporation and six shares of the English corporation were put in the names of Burrows, Whinery and F. H. Hooper, each of whom now claims to be a stockholder in the said corporation respectively; these are the shares of stock concerning which the complainant prays for an injunction.

The bill alleges further that the business in which these parties had embarked was carried on with great vigor and with great profit all over the world, and that accounts thereof were kept at a central office in London, the accounts relating to the English business after the liquidation of Clarke & Company, Ltd., being kept in the books of Hooper & Jackson, Ltd., and the accounts relating to the business in the other portions of the world being kept in the name of the Illinois corporation; that the cash receipts from the business in all the countries covered thereby were deposited indiscriminately in the same banking accounts, from which expenditures were made generally without regard to whether the business concerned was entered on one set of accounts or the other, or whether the business involved was that conducted in Great Britain or in foreign countries; that these accounts were kept in the name of Hooper & Jackson, Ltd., and in the names of Horace E. Hooper, the defendant, and Walter M. Jackson, the complainant, and until 1904, in the name of the

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Illinois corporation; that these banking accounts were subject to drafts by Hooper or Jackson individually, and that during the entire period covered by the business, each one drew therefrom at will for his private and personal uses, and each one also drew indiscriminately from each or any of said accounts for the payment of obligations contracted indiscriminately in the name of the English corporation, the Illinois corporation, Walter M. Jackson and Horace E. Hooper; and that these drafts included also payment made for obligations incurred in the name of the "London Times" and other trade names used by them in the conduct of their business.

The bill further alleges that the profits drawn by Hooper and Jackson were drawn in the manner just indicated; that they drew substantially equal amounts; that they were not paid any salaries out of the corporation assets or out of any other assets of the business so called; that no dividends were ever declared by either of these corporations, except on one occasion when it became necessary for some purpose of convenience to declare a dividend of four hundred per cent. out of the surplus of Hooper & Jackson, Ltd.; that no meetings of the stockholders or of the directors of either of these corporations were ever held, except to comply with the most formal requirements of the statutes under which they were organized, and that until the controversy arose which is the foundation of this suit, neither of the said corporations as such had any active hand in the conduct of the enormous business which arose out of the sale by subscription of sets of the *Encyclopædia Britannica*. In fact the bill states that only four meetings of the directors of the Illinois company have ever been held; that when these meetings were held no business affairs or business policy was ever discussed; that the three nominal directors of the Illinois company and of the New York company, which preceded it were changed from time to time as Hooper and the complainant decreed, and that, in short, the whole business was conducted jointly by Hooper & Jackson as their own business, and that they made use of the corporations they had organized as mere agencies for carrying out the plans which the two principal parties from time to time agreed upon between themselves; and that the other directors as such had little or no

knowledge of and no participation in the very large business that was conducted by Messrs. Hooper and Jackson.

The bill further sets out large and important transactions touching the conduct of the said business which were carried through wholly by Hooper and Jackson without the aid of the corporations, and concerning which they made and executed contracts in their individual names. Particularly does the bill refer to an enterprise so conducted known as "The Times Book Club," which was a specially devised scheme for selling sets of the encyclopædia through the instrumentality of the "London Times." The bill states that the outstanding assets of the business, the legal title to which assets is in the two corporations, is very large, approximately two millions of dollars, and this, in addition to the title of the copyrights and publication rights of the encyclopædia, which, since June 1st, 1903, have stood, and now stand, in the name of the Illinois corporation, and which are valued by the complainant at a very large sum.

The bill further states that just prior to July, 1908, the defendant, Hooper, and the complainant had a disagreement in relation to their joint undertaking which arose out of a proposition to consolidate the encyclopædia business with the property known as the "London Times"; that negotiations were afterwards opened for the sale of the encyclopædia business as a whole; that the breach widened, and that finally steps were taken by Hooper, with the aid of Burrows, Whinery and Franklin H. Hooper, as directors in the Illinois corporation, to exclude the complainant from participation in the conduct of the business; that among other things complained of by him is that the by-laws of the Illinois corporation were amended so that the authority to conduct the entire business of the corporation was practically given to Horace E. Hooper, the president, and by making a majority of the stock necessary for a quorum at a stockholders' meeting, whereas previously the said Hooper and Jackson were equal stockholders, and no meeting could be held without their joint action. The bill alleges also that Hooper, who has obtained control of the English corporation, is threatening to turn over all its assets to the Illinois corporation, and that he has recorded a vote, he himself being the sole director present

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at the meeting, authorizing the English company to turn over to the Illinois company sufficient of its assets to cancel a claim which it appears by its books to hold against the English company, but which the complainant says is purely fictitious; that although Jackson is the treasurer of the Illinois company, the board of directors, by a resolution passed in April of the present year, have practically deprived him of the power of signing checks, and that his authority to do so has been conferred upon an employe of the company who was elected to the office of assistant treasurer; and that having thus excluded the complainant from the conduct of the business, Hooper means to further disintegrate and destroy the general business by a wasteful and unnecessary sale and disposition of its assets. Complaint is made also that Hooper has been guilty of mismanagement of the business and has conducted the same extravagantly, and that in all these matters he has been aided by his brother Franklin H. Hooper, and by the two other directors of the Illinois corporation who hold their positions as stockholders in the company only by reason of the fact that they appear upon the books thereof to hold stock which really belongs jointly to the complainant and Horace E. Hooper.

There is hardly any proposition of fact contained in the bill which is not more or less specifically denied, with one very important exception that will be noted hereafter. In particular, does Mr. Hooper deny the making of the partnership agreement, which is set out at the beginning of the bill. He claims that he and Jackson never entered into any partnership agreement, that they never were partners, but that on the contrary, they were simply equal stockholders, in what are now two corporations, and that there is nothing in the case set out in upwards of five hundred printed pages of affidavits which would justify the court in charging him as a partner with the complainant in this business.

The fundamental feature of the complainant's case, as it is framed, is the agreement set out at the beginning of the bill which the complainant calls the partnership agreement. If no such agreement exists, or ever existed, it is difficult to perceive how the court can declare in favor of a strict partnership. If,

however, the court can imply an agreement from the acts and conduct of the parties, then a different situation may ensue. It is true that in some of the correspondence and in some of the conversations Mr. Hooper and Mr. Jackson spoke and wrote of each other as partners, each calling the other by that significant name, and it is likewise true that there has been a uniform, systematic, energetic and successful course of business between these two men which in the absence of an express agreement might indicate an implied agreement or tacit understanding to carry on a business jointly and for their joint benefit.

There are some statements which, for the purposes of this motion, I shall assume to be facts. Hooper and Jackson engaged in business with the Clarkes, bought them out in 1900 or thereabouts, organized Clarke & Company, Ltd., and at that time carried on the business by their joint direction; they were equal stockholders in that early corporation; they managed it jointly, with the aid of persons who were merely employes, and from that time forward they appear to have employed the corporation form as a mere agency for the convenient and proper conduct of the extremely large business in which they were engaged. There are a number of striking facts in this connection which may be here spoken of. None of these companies ever paid any salaries to either Hooper or Jackson, although they were making enormous profits and acquiring large amounts of property. No dividends were ever declared with the single exception herein above mentioned. Instead of dividends upon their corporate stock, Hooper and Jackson drew profits from the bank accounts of the business; each drew against such accounts as he saw fit, and they each drew a substantially equal amount. The corporation business was carried on, not by meetings of the boards of directors, but by consultation and agreement between Mr. Hooper and Mr. Jackson, and they appear to have made and unmade these corporations, in which they were equally interested, at their will. Many references are made to "the business." Mr. Hooper, in a letter written to his brother Franklin H. Hooper, on April 3d, 1905, comments upon the situation. He encloses in that letter a debit memorandum from the New York office for £805, which is to go through Mr. Muirhead's account on the books of the

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Illinois company kept in its New York office. He says that he cannot see why this is sent, that there may be some good reason for it, but that it is beyond him; that Muirhead was sent to New York for the benefit of the New York office, and not for the benefit of the London office, and that if either ought to charge the other anything, it is the London office that ought to charge the New York office for letting Muirhead stay there. Then follows this significant sentence:

"I wish you would try and get it into somebody's head over there that the whole concern is one, and that it never does any good trying to rob one part of the business for the benefit of the other."

But perhaps the most cogent fact is the indiscriminate commingling of the accounts, fully set out on page eleven of the printed copy of the bill, and not denied by the principal defendant, or any of the affiants who come to his support. The complainant says that receipts from all the countries in which these gentlemen did business were deposited indiscriminately in the same banking accounts, from which expenditures were made generally without regard to whether the business concerned was entered on one set of accounts or the other, or whether the business involved was that conducted in Great Britain or in foreign countries; that funds received from every source alike were deposited in banking accounts kept in four different names and were subject to withdrawal by the principal parties to this litigation, and that they drew indiscriminately in any name used by them in the conduct of their business. While this statement lacks that degree of full and exact verification which ought to accompany so important a narration, inquiry was made by me on the argument concerning the truth of it, and I understood that it was not denied. This statement is wholly inconsistent with the defendant's claim that the business was conducted by the corporations; it shows that the corporation form was a mere form and lends credence to the statement of the complainant that the business was conducted by Mr. Hooper and himself, and that they used the corporations as mere agents.

It appears in the papers that Hooper and Jackson made a personal contract with Franklin H. Hooper by which they agreed

that in certain contingencies and for a certain consideration they would sell him a small percentage of the stock of the two companies; similar agreements were made with others. The coupling of the stock of the two corporations as the subject-matter of these contracts is also significant when taken in connection with Mr. Hooper's remark that the whole concern was one. Franklin H. Hooper now files an answer and cross-bill in which he sets up his contract and claims to be equitably entitled to the benefit of it upon the ground that he has paid some or all of the consideration therefor. I do not think I can regard him as an equitable shareholder in the company at the present time and for the purposes of this motion, because it appears that his rights to the stock is denied by the complainant who has attempted to rescind the contract; and to consider Mr. Franklin H. Hooper a stockholder by virtue of that contract, at this time, would be to decide that branch of the case in his favor on *ex parte* affidavits. Mr. Franklin H. Hooper is the holder, as I remember the statement, of one share of the stock of the Illinois corporation originally transferred to him to qualify him to become a director thereof. A significant fact relating to these qualifying shares, including his own, is that while they appear on the books of the company to stand in the name of these employes, as a matter of fact, the certificates were endorsed by them respectively and handed back to Mr. Franklin H. Hooper, who placed the same in the company's safe, indicating not a delivery, but the very opposite.

If the situation is as it is claimed to be by the complainant, then we have the spectacle of the complainant having wrested from him a hand in the control of a business in which he is interested to the extent of one-half, and this action is accomplished by the other half owner not by extraneous means but by the use and manipulation of the complainant's own stock.

I therefore find that the complainant and the defendant Horace E. Hooper were engaged as principals in a joint undertaking in which they had equal interests, and in which, until this controversy arose between them, they exercised equal control, and from which they derived and were entitled to equal shares of the

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profits, and that the English and Illinois corporations were respectively agencies by which they accomplished their results.

The complainant claims that he and Horace E. Hooper were partners. If they occupied toward each other the legal relation of partners certain rights, duties and liabilities flow therefrom which will need to be considered. It is not always easy to define a partnership or to state in general terms what actual rights, duties and liabilities are included in the term. There must of course be a business to be carried on for profit; there must likewise be some sort of community of interest and a sharing of profits and losses; but all these requirements may exist and yet there may be no partnership. It was held in *Cox v. Hickman* (1860), 8 H. L. C. 268, in the opinion of Lord Cranworth and Lord Wensleydale, that the relation between so-called partners was best ascertained by inquiring whether their agreement was of such a nature as that one was agent for the other or the others. This requirement was adopted by our court of errors and appeals in *Wild v. Davenport* (1886), 48 N. J. Law (19 Vr.) 129. Mr. Justice Depue, speaking for the court, says: "My citation of authorities has been made with a view of showing that a right to receive a share of the profits of a business does not furnish an invariable test of a partnership even as to creditors; that a person not actually engaged in the business as a principal and not holding himself out as a partner, cannot be held for debts contracted in the business as dormant partner unless in virtue of some contract, express or implied, on his part in legal effect creating as between him and the persons actually carrying on the business the relation of principal and agent." *Cox v. Hickman* appears to express the law in England at the present time. *Bullen v. Sharp* (1865), L. R. C. P. 86; 35 L. J. C. P. 105; and see the opinions in the cases of *Mollwo v. Court of Wards* (1872), L. R. 4 P. C. 419; *Adam v. Newbigging* (1888), 13 A. C. 398; 57 L. J. Ch. 1066. I have failed to find any case in which our court of errors and appeals has receded from its adoption of the doctrine in *Wilde v. Davenport*. The rule is followed by the supreme court in *Seabury v. Bolles*, 51 N. J. Law (22 Vr.) 108, and by this court in *Hallenback v. Rogers*, 57 N. J. Eq. (12 Dick.) 199. The rule is distinguished from that



applying to profit-sharing agreements in *Jernee v. Simonson*, 58 N. J. Eq. (13 Dick.) 232, and in *Potter v. Morris & Cumings Dredging Co.*, 59 N. J. Eq. (14 Dick.) 422. I take it therefore to be established law in this state that there can be no partnership within the proper meaning of that term, unless the agreement between the parties contemplates the sort of agency which is contemplated by the rule announced in *Cox v. Hickman*. This peculiar sort of agency is thus described by Sir George Jessel in *Pooley v. Driver* (1876), 5 C. D. 458; 46 L. J. Ch. 436: "It is the one person acting on behalf of the firm; he does not act as agent in the ordinary sense of the word for the others, so as to bind the others; he acts on behalf of the firm of which they are members, and as he binds the firm and acts on the part of the firm he is properly treated as the agent of the firm."

Mr. Justice Story, in the first section of his work on *Partnership*, says: "Every partner is an agent of the partnership, and his rights, powers, duties and obligations are in many respects governed by the same rules and principles as those of an agent; a partner, indeed, virtually embraces the character both of a principal and of an agent. So far as he acts for himself and his own interest in the common concerns of the partnership, he may properly be deemed a principal, and so far as he acts for his partners, he may as properly be deemed an agent." The case of *Carr v. Hertz*, 54 N. J. Eq. (9 Dick.) 127; affirmed, 54 N. J. Eq. (9 Dick.) 700, exemplifies another phase of the theory. There one member of a firm executed a chattel mortgage to secure a firm debt; the other party did not join; he dissented therefrom and so notified the chattel mortgagee. The chattel mortgage was declared to be void on the ground that the agency of the one partner to act for the firm had been revoked, and that the mortgagee had notice of it.

The application of this rule to the facts in this case leaves my mind in some doubt as to whether the agreement set out in the bill itself amounts to a partnership agreement, or whether the long course of dealing between the complainant and Horace E. Hooper would justify the inference that they considered that some sort of a partnership existed between them. The feature

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which is inconspicuous is the fact of agency, which is put forward so prominently in the cases above cited. So far as I am able to observe there was never any transaction of real importance carried on in relation to the joint business which was not discussed and passed upon by the two principal parties in person. I find no transaction of any consequence that was carried through by either Mr. Jackson or Mr. Hooper alone.

This rather leads me to the view that the series of transactions set out in the bill were not strict partnership affairs, but belonged to that class of transactions which are known by the name of joint adventures; there is a class of cases which relate to persons who embark in such undertakings, but who do not enter upon the prosecution of their business as partners strictly. The case of *Ross v. Stevens* (1838), 45 N. J. Eq. (18 Stew.) 231, is an example. That case dealt with a real estate transaction in which the evidence of the relation of the parties was contained in a letter written by one to the other in which the writer said: "It is hereby distinctly understood and agreed that this purchase is a joint transaction involving you equally with me," and in another letter states that they are to share equally in any profit or loss resulting from the transaction. Vice-Chancellor Van Fleet held that the arrangement was not a partnership but a joint venture, and his judgment was affirmed on appeal. The report is meagre, but it is sufficient to differentiate a joint adventure from a partnership and to indicate the full jurisdiction of a court of equity over that class of cases. In *Warwick v. Stockton* (1896), 55 N. J. Eq. (10 Dick.) 61, Vice-Chancellor Pitney dealt squarely with the question. There an inventor sold to a manufacturer the exclusive right to manufacture and sell certain inventions; the manufacturer to furnish all the capital for the enterprise and to pay the inventor half the profits and a salary for his services. The vice-chancellor says, by way of distinguishing the case from *Wild v. Davenport*, *supra*: "There is no provision expressed or implied that the complainant [the inventor] should have the usual power of a partner as agent of the firm to bind the partnership and to take part in the details of the management of the business, nor is there anything in the agreement to indicate that he was to be-

come liable for any share of the losses if the business was unsuccessful. \* \* \* These features show that the relations were not those of partners, but of a mere common interest in a joint adventure." He declined to appoint a receiver to wind up the business, but held the bill for an accounting.

Another case is *Simmons v. Lima Oil Co.* (1906), 71 N. J. Eq. (1 Buch.) 174. There Vice-Chancellor Garrison sustained a suit in equity to wind up a joint adventure because of the misconduct of one of the parties, and for an accounting.

While this distinction exists it has been held that the partnership and the joint adventure are of a similar nature, and that the rules of law which apply to partnerships apply also to joint adventures. In *Getty v. Devlin* (1873), 54 N. Y. 403, there was before the court a joint enterprise in which it was alleged that one of the parties had been guilty of a fraud upon the others. Concerning the law touching the relationship, Commissioner Earl says: "In all such cases, the subscribers enter into relations of trust and confidence with each other. They engage in a common enterprise for their mutual benefit, and have the right to demand and expect from their associates good faith in all that relates to their common interests. Equality and mutuality of burdens and benefits is implied in all such enterprises in proportion to the amounts subscribed, and no one of the subscribers can be permitted to take to himself a secret or separate advantage to the prejudice of his associates."

The same rule was announced by the supreme court of Pennsylvania in *McCutcheon v. Smith*, 173 Pa. St. 101; 33 Atl. Rep. 881.

In *Marston v. Gould*, 69 N. Y. 220, there was a joint adventure in the purchase and sale of shares of the capital stock of the Erie Railway Company, in which the funds were to be provided by the defendant, who was to bear the loss if a loss should ensue, but in which the plaintiff was to have one-fifth of the profit, if there was a profit. This transaction was held not to be a partnership, but a joint enterprise, and that as such it was terminable at any time by either of the parties, and that either could maintain an equitable action against the other for an accounting. See, also, *Hurley v. Walton*, 63 Ill. 260; *Edson v.*

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*Gates*, 44 Mich. 253; 6 N. W. Rep. 645. In *Scudder v. Budd*, 52 N. J. Eq. (7 Dick.) 320, the court of errors and appeals of this state held that in a case where the parties to the suit agreed to erect buildings to be sold at a profit, the defendant to advance the money, and the complainant to contribute his skill and time as superintendent, and to divide the profits equally, the complainant was entitled to an accounting without reference to the question whether a partnership existed between the parties. See *Hambleton v. Rhind*, 84 Md. 456; 36 Atl. Rep. 597.

And finally it has been held that a contract concerning a joint adventure does not need to be express, but may be implied from the conduct of the parties. In *Knapp v. Hanley*, 108 Mo. App. 353; 83 S. W. Rep. 1005, there was a joint enterprise alleged in the plaintiff's petition arising out of an express contract. Apparently, the plaintiff failed to prove the contract, and the court permitted the course of business between the parties to be offered in evidence. There was a demurrer to the evidence which came on for argument in the appellate court. I quote from the opinion: "The law did not devolve upon the plaintiff in the trial to establish the agreements declared on as express contracts of the parties, but it was legally sufficient to exhibit a state of facts from which such agreements might reasonably be inferred by the jury. The evidence expressly disclosed the joint employment and undertaking, but by legal implication in the absence of distinct separate agency, the authority conferred and rights acquired thereby are presumed to be joint. Words of express joinder are not essential, but language of severance must be applied and be present to produce several responsibility or right. \* \* \* As a consequence of such joint agency the law exacted from them the highest degree of good faith, not only toward their principal, but also in all other dealings with each other, and it implied an agreement for an equal division of the compensation paid for their joint services by their common principal in their joint employment."

It thus appears that if these parties are joint adventurers, practically the same rules apply as apply to the relation of partnership. An agreement may be implied from the course of dealing, and when once the engagement has been made the

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parties must act with the utmost good faith toward each other; in case of a disagreement either party may seek the aid of this court for the dissolution of the relation, and in case of misconduct of either party the injured party may have the same relief. The purpose of the court must be to ascertain what the contract, express or implied, between the parties, is, and to enforce it in accordance with the well-settled principles of equity jurisprudence.

In my opinion, the complainant is entitled to an injunction broad enough to hold the *status quo*, and yet so limited as not to interfere with the orderly, regular and usual conduct of the business. Any interference with the efficiency of its management at this stage of the litigation would be wrong and would not be desired by either of the parties. My present impression is that the injunctive order now in force attains the object just indicated, but I will hear counsel on the scope of the injunction within the limits above mentioned upon the settlement of the order.

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PAULINE S. VON BERNUTH

v.

FREDERICK A. VON BERNUTH.

[Decided July 16th, 1909.]

Where a husband, pending suit against him for divorce, applied for the right of access to and custody of his children, two boys, ten and fifteen years of age, respectively, and they, on a private examination, exhibited extreme hatred for their father, absolutely refusing to see him, and declined to entertain any propositions looking toward the father's society, which it appeared resulted from the mother's adverse influence over them, the father's application will be denied; but he was entitled to a reduction of alimony for their support from \$46 to \$10 a week.

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On petition for custody of children in a pending divorce suit.

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*Mr. Borden D. Whiting and Mr. Strong* (of the New York bar), for the petitioner.

*Mr. Thomas L. Raymond, contra.*

HOWELL, V. C.

A divorce suit was brought in favor of the petitioner against the defendant in October, 1908. The defendant has answered and the cause has been set down for final hearing. On June 15th, 1909, the defendant, the husband, filed his petition in the divorce suit praying for an order giving to him the right of access to and custody of his children upon such terms and in such manner as to the court might seem just and proper. On the presentation of the petition, an order was made directing that a writ of *habeas corpus* issue to bring the children before the court. This writ was made returnable on June 23d, 1909, and was returned on that day by the mother who therewith produced the children in court. They are two boys, one about fifteen years of age, and the other about ten. The application of the father was strenuously resisted. I submitted the children to a private examination lasting the better part of a half hour. They exhibited extreme hatred and contempt of their father and absolutely refused to see him or to be seen by him. I urged upon them the duty which they were under to attempt to reconcile their parents, and endeavored to have them consent to spend the month of August with their father at their paternal grandfather's summer residence in the State of New Hampshire, this having been suggested in the petition and proposed in open court. The children declined these propositions and absolutely refused to entertain them or to see the father under any circumstances. I thought that I was able to perceive that the mother had been exercising an adverse influence over the children, because it is quite unnatural that children of fifteen and ten years of age should exhibit toward their father the hatred which these two boys seemed to bear toward theirs. Under these circumstances, I do not see how the court could reasonably grant the prayer of the petition. I think the result is wholly chargeable to the mother, and, under the circumstances, I see

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no reason why the father should be compelled to support children who thus renounce him. I so announced on the return of the writ of *habeas corpus* after my examination of the children, and intimated to counsel for the defendant that I would listen to an application for the reduction of the alimony. Such a motion has been made and has been fully argued on behalf of both parties, and I think it proper under the circumstances and in the exercise of a proper discretion to make the reduction. The matter of alimony and counsel fee was originally referred to a master, who made a report that the two boys were being maintained by the mother without consultation with the father, at the rate of \$2,200 annually, which amount was paid by him. This expenditure amounts to about forty-six dollars per week. I will advise an order reducing the alimony payable by the husband to the wife to the sum of \$10 per week, the reduction to take place from and after the date of the order relating thereto.

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EUGENE V. CONNETT et al.

v.

UNITED HATTERS OF NORTH AMERICA et al.

[Submitted June 30th, 1909. Decided July 19th, 1909.]

1. A court cannot pretend to be ignorant of facts in relation to a strike of employes in a large city within its jurisdiction, which are common to the knowledge of every intelligent person within the county.

2. False statements in affidavits on behalf of defendant opposing a preliminary injunction must be held to weaken very much their evidence in other respects.

3. The undoubted principle of law that every man is bound by the consequences of his own acts applies to the acts of labor unions in ordering a strike and encouraging its continuance, and they must be held accountable for all the results that can properly be traced to their original action.

4. Acts of violence, intimidation, and coercion chargeable to local labor unions, consisting of assaults on employes by strikers and their sym-

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pathizers, assembling of mobs of such persons resulting in riots, turbulent affrays in the streets, and the organization of a system of picketing, for the purpose of annoying employes not participating in the strike, are unlawful.

5. Unless bound by contract, employes may, singly or in a body, leave their employment whenever they choose, and for any reason, or for no reason at all, but when they go they have no right to interfere in the slightest degree with the efforts of the employer to fill their places; and, in like manner, the employer may discharge one or all of his employes, and, having done so, he cannot interfere in any degree with their efforts to obtain employment elsewhere.

6. The employer and employe have correlative rights which appear in our constitution in the clause "among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness," and there is no law applicable to the one that does not apply to the other with equal force.

7. The action of local labor unions in calling meetings, and in the most public and formal manner expelling members refusing to join in a strike, without according them a hearing, where they were guilty of no moral turpitude, and where, according to the by-laws, they had already lost their membership, must be regarded, in passing on the right to an injunction against intimidation of employes desiring to work pending a strike, as action taken to stand *in terrorem* as to the remaining members.

8. Act of February 14th, 1883 (*P. L. 1883 p. 36*), providing "that it shall not be unlawful for any two or more persons to unite, combine or bind themselves by oath, covenant, agreement, alliance or otherwise to persuade, advise or encourage, by peaceable means, any person or persons to enter into any combination for or against leaving or entering the employment of any person, persons or corporation," has no relevancy to a civil suit to enjoin labor unions and their officers and members from unlawful acts intended to intimidate and interfere with the employes of complainants pending a strike.

9. Without proof that a national association of employes as a body encouraged the unlawful acts of local unions in connection with a strike ordered by them, injunction will not lie against it, but its president should be enjoined when notwithstanding his public utterances against unlawful disturbances in connection therewith, he has encouraged the same, and is in fact in charge of the strike, and his utterances have also been at variance with those in which he counseled peace.

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On motion for preliminary injunction.

*Messrs. Sommer, Colby & Whiting*, for the complainants.

*Mr. Samuel Kalisch* and *Mr. Edward M. Colie*, for the defendants.



HOWELL, V. C.

The complainants in this case comprise the firm of E. V. Connett & Company, hat manufacturers, doing business in Orange. The defendants are the United Hatters of North America and four local unions affiliated with it, all of which are unincorporated associations, and many individuals who are members of these locals.

The bill alleges that the members of these unions who were formerly employes of the complainants are on a strike, and that they and the unions to which they belong have been and are interfering with the conduct of the complainants' business, and are attempting to deprive them of the free flow of labor to their factory by unlawful means and by a series of unlawful acts.

These unlawful acts, as charged in the bill, consist of three classes, the general object of all three being the intimidation and coercion of workmen who would be and are willing to work for the complainants in the place and stead of the strikers. The classes of acts of intimidation and coercion complained of are—*first*, actual violence, including assaults, disorderly and turbulent conduct on the streets, the assembling of mobs of strikers and their sympathizers, and the destruction of property by the mobs; *second*, picketing, by which certain persons have been assigned by the local unions to watch the people who approach the complainants' factory for the purpose of procuring work, and assemble about the railway stations in Orange to make overtures to people who they think may be seeking employment from the complainants, and threatening them or attempting against their wishes to persuade them to refrain from entering the complainants' employ; *third*, the penalizing of members of the union who disregard the action of the local unions and either remain in or re-enter the employ of the complainants, the particular charge being that members of the union thereby lose their right of membership and may not be restored except upon the payment of some inordinate fine the amount of which is fixed by the unions in general meeting. These are claimed by the complainants to be unlawful and unjustifiable proceedings. They say that these acts have had the effect of intimidating persons from entering their employment and of coercing others to leave and remain out

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of their employment, and they pray that the defendants may be enjoined from further acts of this character.

I may say at the outset that the situation is a very serious one and has been so since January 15th of this year, on which day the strike began. For six months the hatting district in Orange, and in some parts of Newark, have been in a state of continual uproar and riot. At times the mobs appear to have been entirely unmanageable by the ordinary peace officers of the city. This is common knowledge, and while it does not appear in the affidavits that an appeal was made to the sheriff of the county to assist the local authorities, or that the disturbance attracted the notice of the criminal courts of the county, or that the matter was investigated by the grand jury, it is nevertheless a fact which has come to the knowledge of every person of intelligence in the county and the court certainly could not pretend to be in ignorance of facts which are so universally known.

The complainants are large manufacturers; their normal number of employes is about seven hundred and fifty; they have employed in their business a very large amount of capital; their annual business amounts to over a million and a half of dollars, and their annual pay roll to upwards of \$600,000.

The strike left them practically without employes. At the time of bringing of the suit they had succeeded in employing enough men to keep their factory running, but a large proportion of these employes were and are yet obliged to actually live in the factory and refrain from going on the streets in order to escape the violence with which they were and are threatened. The complainants have been obliged to transfer their hat trimming department to the city of New York, and they have been compelled further to protect their property from the assaults of mobs by employing a large number of private watchmen. In short, the situation is one which ought not to be tolerated in any civilized community and is one of the situations which is intended to be taken care of by the ordinary common-law methods. These acts of violence and disorder which are so fully testified to in the complainants' affidavits and which everybody of ordinary intelligence knows about, are denied by a large number of the affiants on behalf of the defendants. These affidavits, in so far

as they deny the acts of turbulence and rioting and other public affrays in the streets, are undoubtedly false. I must reject their statements on these points and do so with the remark that their evidence on other points, and in fact the whole of the defendants' case, is thereby very much weakened. It is inconceivable that the complainants and their witnesses should testify to such uniform and continuous course of outrage if there were not a foundation of fact for it.

I will first discuss the acts of violence which are charged against the defendants. On April 12th, 1909, a most brutal and almost murderous assault was made upon John Miller. He was rendered insensible and had to be carried to the hospital and was on the following day sent back to his home in Yonkers. This assault is traced to James Brennan, an Italian named Cappania and two other men, all of whom are identified as strikers or their sympathizers and some of them as members of one of the local hatters' unions. On March 15th, Michael Straub was assaulted by a member of the hatters' union near the Highland avenue railway station in Orange. On March 13th a somewhat similar assault was made upon Frank Straub. These assaults seem to have been unprovoked. To some extent they are denied, but the denials are not clear and convincing, and I am led to believe that the facts are as are stated in the affidavits of the three men who were assaulted. There could have been but one cause for it, viz., to intimidate these men, who were actually working for the complainants, and others who might desire to do so, and thus embarrass the complainants in their attempt to carry on their business. Another form of intimidation was that of shouting at the employes, calling them offensive names, following them about in large bodies. Stories of acts of this character are told by Frank Allen, Frank Baker, Walter H. Griffith and Franklin Doty, and similar stories of happenings at the railway station and on the railway are told by Mrs. McChesney and Mrs. Hennion.

As to picketing and thereby attempting to influence the employes of the complainants, it seems very clear that there was picketing and that some or all of the four local unions involved in the strike paid men for the purpose of performing this service.

It appears by the affidavit of Willis Glazier that an executive committee was appointed from Local 13, consisting of Charles Collin, Fred. Schmalz, Stringer White and Thomas Donovan, and from Local No. 14, Richard Lowe, Hugh Glover, James Byrne and Henry H. Jeffreys, to superintend the picketing. These men unite in an affidavit which is intended to deny the allegation on the part of the complainants in that behalf, but a reading of the affidavit shows that instead of a denial it is rather a confession of the fact charged against them. Their affidavit is a joint one, and I quote this from it as showing the sort of denial upon which they rely:

"I am a member of said executive committee and say that these charges and allegations are each and all of them false and untrue. The executive committee in question has been in existence for a number of years and was not specially appointed at the beginning of this strike or for the purpose named."

The four local unions which are affiliated with the United Hatters of North America which are implicated in this strike are known as Local No. 4, Local No. 13, Local No. 14 and Local No. 17. It is stated by the defendants' affidavits that the strike now in progress was not ordered or promoted by the national body, the United Hatters of North America, as is charged in the bill, but was ordered and fomented by these four local unions. From other circumstances in the papers I think that this is a statement of fact. It is an undoubted principle of law that every man is bound by the consequences of his own acts, and this rule applies to the case in hand. These four local unions having ordered the strike and having encouraged it by the payment of wages to individuals to carry it on, must be held accountable for all the results that can properly be traced to their original action. It was so held in *Franklin Union No. 4 v. People*, 220 Ill. 355; 77 N. E. Rep. 176. The following is from the opinion: "It appears that the strike was inaugurated by Franklin Union No. 4, that it provided a place in which the strikers might congregate near the business place of the members of the Chicago Typothetæ; that it raised a fund by assessing members of the union that did not go out upon the strike; that the said fund was used

by it to maintain its members who did go out while they were engaged in the strike; that its regular committee actively sought to induce persons in the employ of the Chicago Typothetæ, or who sought employment from them, not to remain in their employ, or not to accept employment from them, and that many of its members are actually engaged in picketing and in the use of force and intimidation against the employes of the association or persons seeking employment from them. It is clear that the violence, force, threats, intimidation and coercion which immediately followed the inauguration of the strike \* \* \* was the direct result of the action of Franklin Union No. 4 \* \* \* and the results which followed were those which Franklin Union No. 4 and its officers are bound in law to know would likely follow their action in inaugurating and carrying on what counsel characterized as an industrial war, and Franklin Union No. 4 having set in motion the affairs which produced the results pointed out cannot excuse itself for the part it took in the conspiracy by the statement of its officers that they advised the members of the union to be orderly and obey the law." Similar language was used by the United States circuit court for the western district of Tennessee in *Southern Railway Co. v. Machinists' Local No. 14*, 111 Fed. Rep. 49, and in *Union Pacific Railroad Co. v. Ruef*, 120 Fed. Rep. 102, and in the opinion of Vice-Chancellor Bergen in *Jonas Glass Co. v. United Glass Blowers Association*, 72 N. J. Eq. (2 Buch.) 653. I therefore feel bound to charge the four local unions with the acts of violence, intimidation and coercion complained of and of having organized a system of picketing for the purpose of annoying the complainants' employes. It does not need the citation of authorities to show that these acts are unlawful; they have been the subject of frequent adjudication in this state and elsewhere. Unless bound by contract, employes may singly or in a body leave their employment whenever they choose, and for any reason, or for no reason at all, but when they go they have no right to interfere in the slightest degree with the efforts of the employer to fill their places. In like manner the employer may discharge one or all of his employes, and having discharged them he has no right to interfere to any degree with their efforts to obtain employment

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elsewhere. The employer and the employe have correlative rights; they appear in our constitution in the clause

"among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness."

And there is no law applicable to the one that does not with equal force apply to the other.

There remains to be discussed the question which relates to the penalizing of members for disobeying the rules of the association and the imposition of fines, so called, for violation of the union rules. This branch of the case was discussed by counsel for the defendants with great learning and ability, and in a most valuable brief they seem to have collected all the precedents bearing upon the subject; but when I come to a consideration of the case I find that I cannot decide the point that was so elaborately argued. The fact complained of on this branch of the case is that one or more of the local unions have actually expelled members of the union for the professed cause that they did not join in the strike and so violated the commands of the union. The by-laws of the four local unions contain provisions relating to this subject which are substantially the same. Taking the by-laws of Local No. 4 as an example, it appears in article four, section six, that

"Any journeyman who may have gone foul, or who may hereafter go foul in this district, shall make application as provided for in sec. 5 of art. 1, but in no case shall he receive a card for a less sum than thirty dollars cash, and no fine remitted unless by a unanimous consent of the Association."

It was stated in the argument, and in fact the argument proceeded upon the idea that any member of Local No. 4 who remained in or returned to the complainants' employment had gone "foul" and that he thereby *ipso facto* lost his membership in the union, and that it was necessary before he could be entitled to a union card again to make application for membership under article one, section five, which provides that

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"applications for membership to this association shall be made in writing to the secretary, and the same be accompanied with a deposit of fifty dollars; the name of the applicant shall be placed on notice of regular meeting. All applications shall be referred to a committee of seven according to National law, who shall report at next regular meeting, and if applicant is rejected the deposit shall be returned."

I find nothing in these by-laws which gives to the association the right to impose any enormous fine upon an applicant for membership or for reinstatement, excepting in the by-laws of Local No. 13, which provides that if a journeyman shall go "foul" he may afterwards be admitted to membership by application to the vigilance committee and complying with their decision. I take it to be the law of each of these local associations that if a member goes "foul" he thereby *ipso facto* loses his membership and that no action by the association is necessary to cut him off from the benefits of the union.

In this case the local went far beyond what was required in order to relieve the union of the incubus of recalcitrant members. They appear to have called a meeting or meetings of the association and then and there, in the most public and formal manner, expelled certain members who were guilty of disobedience to the decrees of the union. These men who were so formally and publicly expelled had, according to all the theories of the defendants prior to that time, lost their membership, and hence it was unnecessary to take any action whatever. Of course, there is but one conclusion to be drawn from such conduct. It was done for the purpose of exhibiting to the other members the penal effect of remaining peaceably in the employ of the complainants. I do not discuss the right of the union under ordinary circumstances to expel its members if its rules and regulations are violated, but here the circumstances are extraordinary. The expelled members were guilty of no moral turpitude; there was no hearing accorded to them, and if the contention of the defendants is correct it was a useless form, but in the storm and stress of a strike it was undoubtedly expected that the action so taken would stand *in terrorem* as to the remaining members of the association.

I do not think that the act of 1883 (*P. L. 1883 p. 36*) has any relevancy to the facts in this case. If it is to receive the interpretation given to it by Vice-Chancellor Pitney in *Frank v. Herold*, 63 N. J. Eq. (18 Dick.) 443, it does not affect a civil controversy at all. If it does apply to civil remedies it is taken wholly out of this case by the use of the phrase "by peaceable means," for, surely, no one can say that the acts of violence above referred to, for which I hold the local unions responsible, are peaceable.

I do not find in the affidavits any proof that the national association, as a body, engaged in encouraging the unlawful action of the local unions, and hence no injunction can run against that body. I do find, however, that John A. Moffitt, the president of the association, notwithstanding his public utterances against disturbances, has encouraged the same, and, in fact, is in charge of the strike. His utterances on February 12th are entirely inconsistent with those in which he counsels peace and are sufficient in my opinion to make him liable to be enjoined.

I will therefore advise an injunction against John A. Moffitt, the four local unions above mentioned and those of the defendants who are members thereof and who have been served with the order to show cause herein, and also against those defendants who have been served who have made no denial of the allegations against them. The writ should operate as a restraint upon these classes of defendants to prevent them from further commission of the unlawful acts hereinabove mentioned.



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## THE BOROUGH OF SPRING LAKE

v.

KARL T. POLAK et al.

[Submitted June 25th, 1909. Decided July 17th, 1909.]

1. Evidence *held* to show a dedication to public use of certain property marked on a plat.

2. Evidence *held* to show an acceptance by a borough of a dedication of property to public use.

3. The bringing by a municipality of a suit to enjoin defendants from using certain property, and the allegation in the bill of a dedication of the property to public use, and an acceptance thereof, was of itself an acceptance.

4. But little affirmative action is required to indicate an intention to accept a dedication of property to public use.

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On final hearing on bill, answer, replication and proofs.

*Messrs. Durand, Ivins & Carton*, for the complainant.

*Mr. Aaron E. Johnston* and *Mr. William G. Johnson* (of the Washington bar), for the defendants.

HOWELL, V. C.

Prior to 1877 Cephas M. Woodruff and Frederick H. Smith, Jr., acquired a tract of land in Wall township, Monmouth county, having the Atlantic ocean for its easterly boundary. The tract consisted of upwards of seventy-three acres. They caused a map of the property to be made upon which they delineated streets and avenues and divided the property into two hundred and forty-two building lots. Along the ocean front, and a short distance therefrom, they laid out on the map a street one hundred feet wide which is denominated Ocean avenue. The map shows that easterly of Ocean avenue, and between it and the ocean, there is a strip of land which was testified

to be about fifty to sixty feet wide denominated "bluff," and in front of the "bluff" and between it and low-water mark of the ocean there is a strip of land of a varying width which is represented by the word "beach." This map was called "Map of the Brighton Land Association," and it was under that name that Woodruff and Smith made sale of the lots comprised in the tract. It was filed in the office of the county clerk of Monmouth county on April 10th, 1880. Smith and Woodruff eventually sold all the lots, and in every deed made by them was contained a clause written at the end of the description of the land conveyed, of which the following is a copy:

"The above descriptions are intended to conform to the relative location of said lots as they appear on said map; and so much of the land lying easterly of the streets running to Ocean avenue as would constitute such streets if they were extended to the sea, in common with all the owners of lots on said tract, as a free foot-passage way to the sea, and so much of the land of the streets to the middle thereof as constitute the streets which bound directly on the lots hereby conveyed, and so much of the land lying easterly of the lots fronting on Ocean avenue to the line of low-water mark of the ocean as would be comprised between the most northerly and most southerly lines of the lots on Ocean avenue hereby conveyed, if said lines were extended to the sea. And it is hereby expressly agreed between the parties hereto, their heirs and assigns, that all the streets as laid on said map shall remain and continue as public streets never to be closed, without the written consent of all the owners of lots as laid down on said map, and that all the land designated 'bluff' on said map lying easterly of Ocean avenue shall remain open and free as a park or promenade for all the owners of lots as laid down on said map, and no buildings or structures of any kind shall be erected thereon without the written consent of all said lot owners, except light, open and neat summer houses, which will not materially obstruct the view of the sea from any point of the lots on said map. And such summer houses may be built only by those owning lots on Ocean avenue, and by them only in front of their respective lots, and that all the land designated on said map as 'beach' shall be open and free to the use of all the owners of lots on said map, but no buildings except neat bath houses shall be erected thereon, and such bath houses may be erected only by owners of lots fronting on Ocean avenue in front of their respective lots."

The "bluff" appears from the case to be a series of sand dunes of the width of fifty to sixty feet and to be elevated some ten feet in places above the level of Ocean avenue. The strip marked "beach" is the shingle that extends from the "bluff" to

low-water mark and is nearly if not quite covered with water at high tide.

At the time Woodruff and Smith acquired the land in question and made the map and began the sale of lots according to it, the land was subject to the township government of Wall township. In May, 1884, a borough commission was incorporated which included the Woodruff and Smith tract and other lands, which borough commission on January 4th, 1893, was incorporated under the Borough act of 1891 by the name of The Mayor and Council of the Borough of North Spring Lake. The borough of Spring Lake had been incorporated as a borough in March, 1892, and these two boroughs were consolidated under the name of The Mayor and Council of the Borough of Spring Lake in 1904. This borough is the complainant; it claims the right to regulate that portion of the land appearing upon the Woodruff and Smith map which is included within the street lines and within the lines of the parcels marked "bluff" and "beach" upon the theory that these parcels have been dedicated to public uses. The bill alleges that the defendants Polak and Johnson have made a bathing place in front of two of the lots abutting on Ocean avenue by setting posts in the sand of the "beach" and of the "bluff," and other posts in the ocean below low-water mark, and have connected the same by means of life lines which are used by people who bathe in the ocean at that point; that they have done this without the consent or permission of the complainant borough and without any right on their part to maintain the same; and it prays that the defendants may be compelled to remove their bathing fixtures and be restrained from erecting others. Their right depends upon the question of the dedication to public use of the lands lying between Ocean avenue and high-water mark of the ocean.

The complainant claims that a dedication to public uses of the two strips denominated on the map "bluff" and "beach" must be implied from the circumstances, if not from the deeds themselves. I am of opinion that a dedication cannot arise from the clause in the deeds which relates to the lands easterly of Ocean avenue, but the deeds, the map, the conduct of the lot owners and of the municipality, taken together, in my opinion,

manifest an intention on the part of all concerned to consider the property as property devoted to public uses. The delineation of the "bluff" and the "beach" upon the map without explanatory words would lead one to think that this portion of the property was intended to be treated quite differently from the portion which was divided into lots. Similar facts have been taken in other cases to mean an absolute dedication. In *Methodist Church v. Hoboken*, 33 N. J. Law (4 Vr.) 13, a map was made, called the Loss map, in 1804, on which was delineated a plot marked with the word "square." Concerning this, Mr. Justice Depue, in 1868, says: "The word 'square,' as a term of dedication, imported a complete and unrestricted abandonment to the public uses above indicated." In *Price v. Plainfield*, 40 N. J. Law (11 Vr.) 608, a map was made upon which there was a plot of about three acres represented on the map by a space in which was written the word "park." This was held by our court of errors and appeals to be a dedication of the plot to public uses as a public park. In *Bayonne v. Ford*, 43 N. J. Law (14 Vr.) 292, a map was made on which was laid out an open space which was marked "Annette Park, now belonging to R. Graves." It was held that the property represented by this section of the map was devoted to public uses as a public park. In *Weger v. Delran*, 61 N. J. Law (32 Vr.) 224, a map was made which was entitled, "Plan of Bechtold's 4th Addition to the Town of Progress," on which all the blocks, except the *locus in quo*, were divided into numbered lots. The property in dispute was distinguished from the other blocks by a different coloring, by the delineation of trees and paths and by a rough representation of a fountain in the centre. The court of errors and appeals held that the property so marked was devoted to public uses. In *Fessler v. Town of Union*, 67 N. J. Eq. (1 Robb.) 14, a map was made indicating an open space one hundred and fifty feet wide and between two and three hundred feet long marked "Liberty Place," in which there was laid down a small lake shaped like an elongated egg marked "Indian Pond." The map showed also within the open space some flower beds and representations of trees. It was held that the property comprised in the open space was dedicated to public uses. In all

these cases the maps had been published and lots had been sold in accordance with them, and all the requirements for dedication had been complied with.

In my opinion, the delineation of the "bluff" and of the "beach" upon the map in evidence in this case, amounted to a tender of dedication to public uses on behalf of the owners of the fee, and in order to complete and finally confirm the title of the public to the easement for public uses nothing was required except an acceptance by the municipal body having jurisdiction over it. I do not find in the case any evidence that the proffered dedication was accepted by Wall township, but immediately upon the organization of the borough commission in May, 1884, there is in the minutes of the commission very early reference to the property and very early action with respect to it. In May, 1884, the council authorized the construction of culverts under the "bluff" to carry off storm water from the streets to the ocean, and thereafter the municipal government did many other things which indicated their acceptance of the dedication. There was a boardwalk constructed partly on the beach and partly on the bluff with money that was raised by private subscription, but the municipality insisted upon supervising the work of laying it, and it was done under the supervision of the officer known as superintendent of the borough. This boardwalk has been renewed three or four times, and has been kept in repair and been maintained all at the expense of the municipality. The bluff and beach have been lighted, policed, cleaned, superintended and watched over by the municipality at its own expense, and since the shore in front of the Woodruff and Smith tract became a part of the complainant corporation the complainant has borrowed money on a bond issue to be used in improving it, including the property in question in this suit. In fact, the bringing of this suit and the allegation in the bill of a dedication and acceptance is of itself an acceptance. *Atlantic City v. Snee*, 68 N. J. Law (39 Vr.) 39. It takes but little affirmative action to indicate an intention to accept a dedication. In *Arnold v. Orange*, 73 N. J. Eq. (3 Buch.) 280, it was held the construction by the municipality of a public sewer in a dedicated street was an acceptance, and in *Peoples Traction Co. v. Atlantic*

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*City*, 71 N. J. Law (42 Vr.) 134, an ordinance providing for the paving of a dedicated street was held to be an acceptance. Besides these affirmative acts on the part of the municipality, it is very clear that the public generally has used the land in question as a public walk and promenade and for the purposes of bathing and taking the air, for a period of upwards of twenty years. In fact, the defendant Polak, when he constructed his bathing place in the manner above mentioned, was careful to notify the public of the public character of the bathing place that he had erected by putting up a painted sign advertising the fact that his bathing place was open to the public. The case of *Riverside v. Pennsylvania Railroad Co.*, 74 N. J. Law (45 Vr.) 476, maintains this proposition, and is also authority for the right of the municipality to maintain this suit.

There will be a decree for a mandatory injunction to compel the defendants to remove their bathing fixtures from the bluff and beach and restraining them from erecting other or similar ones in the future.

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AARON E. JOHNSTON, executor,

v.

THOMAS P. MCKENNA et al.

[Submitted June 11th, 1909. Decided July 21st, 1909.]

1. Where defendants in a suit fail to produce one of the defendants as a witness, or his deposition, and his testimony under the circumstances of the case is of the last importance to the other defendants, and the failure to produce him is not explained, the court will expect from the remaining defendants evidence of a character that is clear and convincing to sustain their defence, and any uncertainties in the evidence which he might have cleared up will be resolved in favor of the complainant.

2. Where a transfer of an equity of redemption of great value for a totally inadequate consideration and on an understanding that it was being taken for the benefit of the mortgagor is procured, the burden of proof, in an action to compel the transferees to account to the mortgagor,

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is shifted to the transferees, who are called upon to give the utmost explanation and the freest and most open disclosures of all the facts.

3. In a suit to reach the surplus arising from a mortgage foreclosure sale, evidence *held* to show that defendants procured a transfer of the equity of redemption at a totally inadequate consideration, and under an understanding that the mortgagor's interests would be protected so as to render them liable to the mortgagor for the loss sustained.

4. Where, in a suit to reach the surplus arising from a foreclosure sale, it is shown that defendants, transferees of the equity of redemption, obtained the transfer through fraud, a decree for the loss occasioned to the mortgagor by the actions of the transferees may be had against them personally, and it is not necessary to follow the property.

5. Laches which does not prejudice the defendant, but injures only the complainant, cannot defeat the suit.

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On final hearing on bill, answers, replication and proofs.

*Mr. Aaron E. Johnston and Mr. Frank P. McDermott*, for the complainant.

*Mr. Charles J. Roe*, for the defendant Hugh E. O'Reilly.

*Mr. Joseph Coult*, for the defendant Thomas P. McKenna.

HOWELL, V. C.

This bill is filed by the administrator of the estate of Mary E. Throckmorton to recover the sum of \$8,000 or thereabouts, being the surplus money arising from the foreclosure of a mortgage on lands owned by his intestate in Monmouth county, and which it is alleged was wrongly diverted from her by the joint action of Patrick J. Reilly, Hugh E. O'Reilly, Jr., and Thomas P. McKenna. The property is known as the Rockwell Hotel. It was purchased by Mrs. Throckmorton on May 4th, 1882, from a firm of liquor dealers in New York named O'Reilly, Skelly & Fogarty. Their deed to her is dated on that day. On the same day she gave back to the firm a purchase-money mortgage for \$4,900.

On account of the death of Fogarty the firm went into liquidation. He left a will by which he appointed the surviving partners to be executors thereof.

On February 23d, 1892, Mrs. Throckmorton made a second mortgage on her hotel property to the O'Reilly, Skelly & Fogarty Company to secure a loan of \$2,000. This mortgage was subsequently transferred to the executors, Hugh O'Reilly and Skelly, and thus these executors, as executors and as individuals, held title to both mortgages.

On December 18th, 1899, C. A. Spalding recovered a judgment against Mrs. Throckmorton for \$283. On March 22d, 1899, M. Wooley recovered one for \$24, and on July 8th, 1899, Clarence Van Note recovered one for \$339, on all of which executions were issued under which levies were made on the mortgaged premises. The property was advertised for sale by the sheriff of Monmouth county for July 30th, 1900, and was sold on that day to Van Note, who meantime had taken an assignment of the Spalding judgment. A sheriff's deed was made to Van Note for the property on August 2d, 1900, from which time forward he claimed to be the owner of the fee therein. Meantime taxes for several years remained unpaid. Thomas P. McKenna, one of the defendants, took title under tax sales for 1898, 1899 and 1900, which he transferred to Howard Green; Van Note therefore held title subject to the two mortgages and the tax liens.

On October 4th, 1900, the mortgagees filed their bill to foreclose the two mortgages. Mrs. Throckmorton and Van Note were parties. Mrs. Throckmorton could not be found to be served, and an attempt was made to bring her in by publication. She filed no answer, and a decree *pro confesso* was taken against her on March 23d, 1901. There was a final decree on May 20th, 1901, and *fi. fa.* issued on June 12th, 1901. The sheriff advertised the premises for sale and they were sold on August 5th, 1901, to the defendant Patrick J. Reilly for \$16,300. The sum due for liens on that day was \$8,263.92; this included \$353.35 due to Howard Green for his tax lien. It left a surplus of \$8,036.08, which is the subject-matter of this suit.

Van Note held title until the day of the sale. On that day, and just before the sale, he made a conveyance of the premises to Patrick J. Reilly. This conveyance is important and will be mentioned later on. This deed to Patrick J. Reilly gave him on



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the face of the papers the title to the fee-simple of the land, and it consequently gave him a presumptive right to the surplus money. On August 14th, Patrick J. Reilly (Thomas P. McKenna acting as his solicitor) presented to this court a petition setting out the proceedings in the foreclosure suit, his purchase at the sheriff's sale, the conveyance of the fee to Patrick J. Reilly by Van Note, and his claim to the surplus money, and praying that an order might be made directing the sheriff to accept his receipt as payment of the balance of the purchase-money. On that day an order was made referring the matter to a special master to ascertain the truth of the allegations, and also whether the petitioner was entitled to have the sheriff accept his receipt for the surplus money. A report was made upon this reference on August 16th in accordance with the prayer of the petition, which was confirmed on August 20th by an order that directed the sheriff to accept the receipt of Patrick J. Reilly as payment to the extent of the balance of the purchase-money arising from the sale over and above the amount directed to be raised by the execution. It was by this means that the surplus money was diverted from Mr. Van Note and Mrs. Throckmorton to Patrick J. Reilly.

At the time of the sheriff's sale the property was in the actual possession of one Vaugoine, who held under a lease from Nathanson, who held under Mrs. Throckmorton. Vaugoine attorned to Van Note, and Nathanson's attempt to assert title failed. Vaugoine paid Van Note rent at the rate of \$1,500 a year, besides sewer and water rents and repairs.

The event which led up to this suit occurred a few days before the foreclosure sale. There is no doubt but that McKenna and Hugh E. O'Reilly, or certainly McKenna, attempted to purchase Mrs. Throckmorton's interest in the property some time before the foreclosure sale. This is shown by the testimony of Mr. and Mrs. Childs, at whose house Mrs. Throckmorton was living. They state that Mr. McKenna and another gentleman came there to see Mrs. Throckmorton and that they attempted a negotiation with her about this property, but that she refused to sell them her interest. This statement of these two witnesses is partially denied, although both O'Reilly and McKenna admit

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that they went to the Childs' house on at least one occasion for the purpose of seeing Mrs. Throckmorton. Van Note says that he met Mrs. Throckmorton in McKenna's office about a week before this sale, and that McKenna then and there said to him, Van Note, that he, McKenna, represented Mrs. Throckmorton, and that an agreement had been made that the O'Reilly firm, mortgagees, would protect Mrs. Throckmorton, and that Hugh E. O'Reilly became a party to the arrangement a couple of days before the sheriff's sale. Van Note says the agreement was that he was to receive \$1,250 and make a conveyance of the property to Mrs. Throckmorton or to someone that she and the mortgagees together might designate, and that the property was to be held by the grantee for her benefit; or, on the other hand, if it might be so agreed, the third person might receive the rents, pay Mrs. Throckmorton a small amount for her support and use the balance to reduce the claims, and that when the claims had been reduced to a figure somewhere near the face of the original mortgages, a conveyance was to be made back to Mrs. Throckmorton, and that in the meantime, if a sale could be made, it was to be by consent of the mortgagees and Mrs. Throckmorton, and any sum received above the amount which the mortgagees had in the property and their necessary expenses was to go to Mrs. Throckmorton. He further says that in pursuance of this agreement he, on the Saturday preceding the sale, drew a deed for the premises in question to the defendant Hugh E. O'Reilly; that the defendant McKenna took the acknowledgment of Van Note and his wife, and that the defendant O'Reilly then offered him his personal check for \$1,250. Van Note declined to take it until he had a consent from Mrs. Throckmorton. The defendants O'Reilly and McKenna then stated that they would not use the deed for any purpose until they had the proper authority from Mrs. Throckmorton, but desired to take the deed, leaving the check and stating they would be back later in the day. He says that they did come back about seven or eight o'clock in the evening and stated that they could not find Mrs. Throckmorton; that they were very anxious to have the sheriff's sale come off on the following Monday, and sought to obtain Van Note's release and a final delivery of the deed;

that Van Note finally consented to deliver the deed and accept a check upon the defendants' promise that they would get Mrs. Throckmorton's consent before the sale or as soon as possible afterwards. On Monday morning, the day of the sale, Van Note says that O'Reilly and McKenna came to him and asked him if he would make a deed for the premises to Patrick J. Reilly. His recollection is that a new deed was prepared by himself early Monday morning before the parties went to Freehold to attend the foreclosure sale, and that McKenna came again and took the acknowledgments, and that the old deed was destroyed. I may pause here to say that the deed in question, a certified copy of which was put in evidence, shows that it was dated and acknowledged on Saturday, August 3d, 1901. The check for \$1,250, drawn by Hugh E. O'Reilly, which was delivered to Van Note on Saturday, was deposited by him on Monday morning to his credit in the Long Branch bank. Payment of that check was stopped by the drawer, and either Tuesday evening or Wednesday morning O'Reilly delivered to Van Note the check of Patrick J. Reilly for \$1,250, which was deposited on Wednesday, August 7th, and was paid in regular course. The sum and substance of Mr. Van Note's testimony is that when he transferred the property to Reilly he did it at the request of O'Reilly and McKenna, and wholly for the advantage of Mrs. Throckmorton, and in order that she might have the benefit of the large equity which would remain after satisfaction of the mortgages and the tax liens. It is quite apparent that if this statement is true, or substantially true, or if there was any engagement or understanding between these parties that Mrs. Throckmorton was to have the ultimate benefit of her own property, there must, in justice, be a decree in favor of the complainant.

I do not regard the testimony as to what took place between Mr. McKenna, Mr. O'Reilly, Mr. Duffy and Mr. Van Note on the beach after the sheriff's sale as of much importance in the case, for the reason that at that time Mr. Van Note does not appear to have been convinced or to have had any notice of the fact that McKenna and O'Reilly did not intend to deal with Mrs. Throckmorton in accordance with his, Van Note's, agreement with them, concerning her. This conversation took place

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in August of 1901, after the sale but prior to its confirmation and the delivery of the deed, and whatever Mr. Van Note said at that time seems to me to be entirely consistent with his idea that ultimately Mrs. Throckmorton was to get the benefit of the transaction.

The same course of reasoning applies to the efforts made by Mr. Van Note to procure a discharge of the notice of *lis pendens* which accompanied the suit against him and his efforts to aid McKenna and O'Reilly to get in the tax title which was outstanding in the name of Green; he does not appear at that time to have suspected that there was any disposition to deprive Mrs. Throckmorton of the benefit of the contract which he claims to have made on her behalf.

The foreclosure sale took place at Freehold on Monday afternoon, August 5th. The sale was confirmed on September 3d. The deed made to Patrick J. Reilly in pursuance thereof was dated, acknowledged and recorded on September 5th, 1901. Nothing was paid to the sheriff on the day of the sale on account of the purchase-money. Mr. Duffy, who was the mortgagees' solicitor, acted at the sale for the purchaser Reilly. He says that he waived the payment of the percentage. Meantime, and before the execution and delivery of the sheriff's deed, and on August 10th, 1901, P. J. Reilly made a mortgage for \$2,000 on the property to Hugh E. O'Reilly. This was made, as Hugh E. O'Reilly says, to secure three loans, one for \$1,250, the date of which O'Reilly does not know, one for \$250 a few days later, and another for \$500, the date of which is not given.

I have no difficulty in believing that the \$1,250 loan was the money paid to Van Note for the conveyance just prior to the foreclosure sale, and that the other amounts were for other payments connected with the transaction. The tax title of Howard Green footed up about \$375, and there were doubtless other necessary expenses. The manner of securing this debt is a novel one; it was by a mortgage on the lands sold, the title to which had not yet passed to the purchaser. O'Reilly explains this by saying that he had full confidence in Reilly because they had been partners in business. This mortgage was canceled November 2d, 1901.

Mr. Duffy says that about November 1st, 1901, Patrick J. Reilly, the purchaser of the premises, executed a mortgage to a man named Hinds for \$8,000. This money was used for the purpose of paying off the complainants in the foreclosure suit. It thus appears that Patrick J. Reilly, or whoever became the real owner of the property, acquired the title thereto without the payment of any money whatever. He had satisfied the mortgages out of the Hinds loan and had satisfied the Hugh E. O'Reilly mortgage by giving him another mortgage for the same amount upon the same premises, and had thus shut out Mrs. Throckmorton from any participation in the proceeds of the sale or any interest in the property itself. The title remained in P. J. Reilly, subject to the two mortgages, until May, 1902; meanwhile it was in the possession of Vangoine as tenant. Mr. Duffy collected the rents, and he finally made sale of the premises to the tenant, Vangoine, by an agreement dated April 30th, 1902, for \$14,500. The deed was executed and delivered on May 26th of the same year. Vangoine took the property at \$14,500, subject to the \$8,000 mortgage only, which left a surplus of \$6,500 in Mr. Duffy's hands to be disposed of; this he did, as follows: He paid to himself for his fees, costs, &c., \$500; he paid to Hugh E. O'Reilly, to satisfy his mortgage, the sum of \$2,000; he gave his check to the defendant McKenna for \$3,000, and the balance, amounting to \$1,000, he paid to Hugh E. O'Reilly.

This is the framework of the facts as I find them. There is, however, controversy and denial at each stage of the case. There is, in the first place, a denial of Mr. Van Note's statement as to what was the original bargain between Mrs. Throckmorton, Mr. McKenna, Mr. O'Reilly and Mr. Van Note—a denial that Mrs. Throckmorton was to have any interest in the premises or its proceeds—a denial that Mr. O'Reilly and Mr. McKenna profited by the transaction beyond their reasonable fees and necessary expenses, and an assertion that the whole transaction was carried through by them for the benefit of Patrick J. Reilly.

Patrick J. Reilly is a defendant to the suit; he resides and at the time of the hearing resided in the city of New York; his evidence was of the last importance to the other defendants in the case; he could have cleared up many things in the testimony

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which are now enveloped in a cloud of doubt. He was not produced, nor was his testimony taken by commission; nor is the failure to do either explained by either of the defendants. This is a circumstance which, under the peculiar conditions of this case, must disturb the burden of proof and lead the court to expect from the remaining defendants evidence of a character that is clear and convincing. In his absence, whatever doubts there are in the testimony which it is apparent he might have cleared up if he had been present, must be resolved in favor of the complainant. The funds in this case are finally traced to Hugh E. O'Reilly and Thomas J. McKenna, and I do not think that they have cleared themselves of the receipt thereof. Hugh E. O'Reilly says that the portion of the money that was paid to him was credited by him on account of what P. J. Reilly owed him, but he fails to produce P. J. Reilly or any books of account showing transactions with him or any documents of any nature showing the disposition of the fund or on what account it was credited. Mr. McKenna, to whom \$3,000 of the fund was paid, states that out of it he was to have a fee of \$1,000, and that the other \$2,000 was paid in the purchase of some securities for Patrick J. Reilly, and that those securities were afterwards cashed and Mr. Reilly got his money, principal and interest, but he gives no particulars of the transactions, nor any list of the securities thus dealt in. His whole story is lacking in the details of time, place and circumstance.

I think that the burden of proof on this issue is on Mr. McKenna, and I am not satisfied with the statements that he makes. I see no reason why both O'Reilly and McKenna should not have corroborated their statements on all these points when it is obvious that it would have been so easy to do it. I cannot help believing that Patrick J. Reilly was a mere dummy in the hands of the other two defendants. He does not appear to have had anything to do personally with the transaction except to give his check for \$1,250 to Van Note. Hugh E. O'Reilly furnished the money for this check which he got back from Duffy in the final distribution in May, 1902. The only other place in which he has personally appeared was before the master on the application for surplus money in the foreclosure suit.

Recurring once more to the events which took place just prior to the sale as detailed in the evidence of Mr. Fay. He says that prior to the foreclosure sale he had conversations with both Hugh E. O'Reilly and Mr. McKenna. He at that time had been retained by Mrs. Throckmorton to pursue Van Note, who held title to the mortgaged premises. In his conversation with Mr. Hugh E. O'Reilly he says that Mr. O'Reilly agreed to do what he could to allow the loan to remain and to have the sheriff's sale adjourned and give Mrs. Throckmorton an opportunity to arrange matters so that she could hold her property; that he stated that the mortgagees were willing to do anything for her because they had known her for a long time and she had originally bought the property from them, and that if the mortgagees were eventually compelled to take the property and Mrs. Throckmorton could then make any arrangements to get it at any time thereafter, they would protect her interests. In his conversation with McKenna just prior to the sale, Mr. Fay says that he told him all the facts concerning the sale of the property under Van Note's judgment, that Van Note had agreed to make a conveyance back to Mrs. Throckmorton, and that he, Fay, had prepared a bill in Mrs. Throckmorton's favor to compel a reconveyance to her by Van Note; that he unfolded to him the plan of the suit, and that on one occasion when Mr. Fay was in Mr. McKenna's office Mrs. Throckmorton was there, and she said to Mr. McKenna: "You agreed to protect me in this matter and you were to look after my interests."

In view of all the testimony in the case, and of the fact that Mr. Fay is entirely disinterested, I am led to believe that these conversations took place, and that these disclosures were made to the defendants by Fay. If it were not true that Van Note was willing to reconvey to Mrs. Throckmorton upon favorable terms, I see no reason why he should have conveyed the property to Reilly for \$1,250 unless he expected the conveyance would be used in some way for the benefit of Mrs. Throckmorton. Mr. Fay attended the sheriff's sale on August 5th, but the proceedings there do not seem to have impressed him very much. On August 12th, he, Fay, filed a bill in favor of Mrs. Throckmorton against Van Note, P. J. Reilly, Thomas P. McKenna, Hugh

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O'Reilly and Joseph A. Duffy, charging generally that the property was hers and that she was being cheated out of it. This bill appears to have been prepared before the foreclosure sale as a bill against Van Note alone, and afterwards was amended so as to bring in the other defendants. Upon the filing of this bill Vice-Chancellor Reed made an order restraining Van Note from receiving any of the surplus money in the foreclosure suit and directing the sheriff to pay the same into court. This order was filed on August 19th, 1901, and appears by the testimony of Mr. Fay to have been served upon the sheriff, if not upon the other parties. If it was not served on the defendants, I do not see how knowledge of it could have escaped them; there were too many persons interested in the transaction, and there had been too much talk about the situation to permit an important order like the one now mentioned being unobserved. It was two days after the date of this order that the surplus-money petition was filed and the order of reference made to the master. It may be said just here that this bill against Van Note and others was demurred to, and upon the demurrer being sustained, was dismissed.

It is inconceivable that Van Note intended by his deed to convey the large surplus which existed in this property to either Hugh E. O'Reilly, to whom he made the first deed, or to Patrick J. Reilly, to whom he made the second deed, or that he intended that they, or either of them, should take a benefit by the transaction. There seems to be no reason why he should have wished or intended to give them a profit of several thousand dollars, nor is their presence in the transaction at all satisfactorily explained. In fact, the only explanation that was given by either of them for interfering was that Hugh E. O'Reilly had brought the property to the attention of Patrick J. Reilly, who determined that he would like to have the property for hotel purposes, yet although he held the title to the property from September, 1901, to May, 1902, he does not appear to have made any attempt to use it for hotel purposes. There is some evidence that someone attempted to procure a license for the place, but it could not have been Patrick J. Reilly, because he never lived in the premises. Van Note could probably have retained this surplus for himself; he



had given Mrs. Throckmorton a chance to redeem and she had failed; she had employed Mr. Northrop of Jersey City and Mr. Fay of Long Branch to procure loans for her with which to redeem the property from the mortgages, and he appears after her failure to have claimed the property for his own.

I am forced to the conclusion that the decree must go against the defendants upon the grounds hereinabove stated. They appear to me to have procured a transfer of an equity of redemption of great value for a totally inadequate consideration and upon a representation, or at least an understanding that it was being taken for the benefit of Mrs. Throckmorton; that these facts under well-known principles shift the burden of proof and call upon the defendants for the utmost explanation and the freest and most open disclosure of all the facts. This burden has not been met, nor has this disclosure been made, and I must therefore hold them responsible for the loss which has been occasioned to the estate of Mrs. Throckmorton by their action. Indeed, I may go further and say that in my opinion the case made by the bill has been fully proved, and that the complainant is entitled to a decree on his own showing.

I am made the more firm in my conviction of the justice of the complainant's case by a perusal of the opinion of Vice-Chancellor Pitney in the case of *Johnston v. Reilly*, 68 N. J. Eq. (2 Robb.) 130, in which the facts are almost identical with the facts in this case. That was a suit originally brought by Mrs. Throckmorton in her lifetime and carried on by Mr. Johnston, her administrator, after her death to a final decree. The bill was filed January 16th, 1903, against Patrick J. Reilly and Hugh O'Reilly and Patrick Skelly, individually, and as executors of Patrick A. Fogarty, deceased. The allegations of the cause of action are substantially the same as those alleged in this case. At the hearing it was conceded by the complainant that O'Reilly and Skelly could not be made liable either individually or as executors, and a decree passed against Patrick J. Reilly alone, charging him with the whole liability for the surplus money in the said foreclosure suit. At the time of the filing of the bill the present complainant, who was solicitor in that suit for Mrs. Throckmorton, states that he was unaware of the hand that Hugh E.

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O'Reilly and Thomas P. McKenna had in the affair, and that it was for this reason that they were not included in that bill. Their inclusion in the present bill was made the subject-matter of a demurrer by Hugh E. O'Reilly, which demurrer was overruled by Chancellor Magie. His judgment thereon was sustained by the court of errors and appeals. *Johnston v. O'Reilly*, 74 N. J. Eq. (4 Buch.) 448. In the *Reilly Case*, 68 N. J. Eq. (2 Robb.) 130, on the facts therein developed, Vice-Chancellor Pitney held Patrick J. Reilly liable for the whole of the surplus money, estimating the value of the property at the price bid for it at the foreclosure sale. He charged the defendant with \$16,300, with interest, from September 5th, 1901, and credited him with the sum of \$1,250, with interest, from August 5th, 1901, to September 5th, 1901, and with the amount due on the foreclosure execution on September 5th, 1901, besides the sheriff's fees. The remainder, with interest to the date of the decree, was the amount for which he directed a decree.

The defendants claim that no decree can pass against them for the proceeds of the sale of the property in question, but if a fraud has been committed, the only claim the complainant can have is a claim directly against the property. I find no authority in the brief for this contention, while there is abundant authority discoverable upon the slightest search the other way. This argument can be disposed of by simply saying that if it is true all that is necessary to effectuate a fraudulent scheme for obtaining possession of and title to property, real and personal, would be to have it transferred to a *bona fide* purchaser.

The defendants likewise interpose the defence of laches. I do not see how the delay in bringing this suit has prejudiced the defendants in any particular. The only witness who has died out of the defendants' case is Hugh O'Reilly, the grandfather of the defendant Hugh E. O'Reilly, and it does not appear that he knew anything about this transaction. On the contrary, the delay has been very prejudicial to the complainant. The real party in interest, Mrs. Throckmorton, has died since the litigation began, and indeed was dead when this suit was started. I must therefore say that I cannot regard the defence of laches.

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I will advise a decree in favor of the complainant upon the principles set out by Vice-Chancellor Pitney in the *Reilly Case* above cited. The complainant will be entitled to costs and to a reasonable counsel fee, to be fixed by the chancellor.

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UNITED STATES FIDELITY AND GUARANTY COMPANY

v.

CITY OF NEWARK et al.

[Submitted July 21st, 1909. Decided July 29th, 1909.]

1. Notice to the city of the assignment of a contractor's claim against it for money due under the contract was not essential to the validity of the assignment as against a subcontractor's lien subsequently filed under the Municipalities Lien Law act of March 30th, 1892 (*P. L. 1892 p. 369*), the statutory lien having only the effect of an attachment lien, and the lienor being in no better position than the debtor.

2. The board of street and water commissioners of a city of the first class being a joint party with the city to a contract for the construction of a reservoir, and having supervision of its performance, and power to draw upon the city for payment therefor under act of March 28th, 1891 (*P. L. 1891 p. 249*), notice to it of the assignment by the contractor of money due under the contract by its adoption of a resolution permitting the assignment and notice to the mayor who approved such resolution was notice to the city.

3. The consent of the city to the assignment by a contractor of money due under the contract was not essential to the validity of the assignment as against the subsequent statutory liens of subcontractors, notwithstanding a provision in the contractor's contract with the city prohibiting an assignment without the city's consent; such provision being for the city's protection and not for the benefit of subcontractors, &c.

4. A provision in a subcontract that it was made with reference to the contractor's contract with the city, which applied to the subcontract, except where otherwise provided therein, could not be invoked in an action by the subcontractor against the city to enforce a statutory lien; the city not being a party to the subcontract, and its rights not being affected thereby.

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5. When a subcontractor sued a city to establish a statutory lien without knowledge of the contractor's assignment of the money due it under the contract, costs will only be allowed the intervening assignees from the filing of the answer upon judgment for them.

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On final hearing. On bill, answer, replication and proofs.

*Messrs. McCarter & English*, for the complainant.

*Mr. Sherrerd Depue*, for James C. Stewart et al.

*Mr. Michael Dunn* and *Mr. Charles B. Dunn*, for the Empire Granite Company.

*Mr. Herbert Boggs*, for the city of Newark.

HOWELL, V. C.

The parties to this suit are before the court under the provisions of the Municipalities Lien law. *P. L. 1892 p. 369*. Stewart & Abbot made a contract with the city of Newark for the construction of the Cedar Grove reservoir. James Seme made a subcontract with Stewart & Abbot for the performance of a portion of the work. The complainant, a corporation engaged in the surety business, became surety to Stewart & Abbot for the performance by Seme of the provisions of his subcontract. The bond or instrument of suretyship contained this clause:

"Second; that in case of such default on the part of the principal, the surety shall have the right, if it so desires, to assume and complete or procure the completion of said contract; and in case of such default, the surety shall be subrogated and entitled to all the rights and properties of the Principal arising out of the said contract and otherwise, including all securities and indemnities theretofore received by the Obligee, and all deferred payments, retained percentages and credits, due to the Principal, at the time of such default, or to become due thereafter by the terms and dates of the contract."

Seme failed to perform his subcontract, and the same was completed by the surety company. After its completion, and on December 12th, 1904, it filed a lien under the Municipalities

Lien law against the fund in the custody of the city of Newark arising out of the Stewart & Abbot contract for \$35,200.21, and on March 9th, 1905, brought suit thereon in this court for the foreclosure thereof.

The Empire State Granite Company, claiming to have furnished materials for the performance of the Stewart & Abbot contract, on March 3d, 1905, filed a similar lien for \$2,136.48. Suit was brought thereon by it on May 31st, 1905. I do not find that these two suits were ever consolidated. They were, however, heard together on the question hereinafter discussed. It was admitted by the city of Newark that there were in its treasury sufficient funds to pay both these claims if no other right had intervened.

It now appears that prior to the filing of either of the said liens, and on November 18th, 1904, Stewart & Abbot, the original contractors, by writing, made an assignment to Alexander M. Stewart and James C. Stewart, strangers to the contract, of any and all moneys due and to become due to said Stewart & Abbot from the city of Newark thereunder for work done and materials furnished therefor and in execution of the same. The assignment contained the usual powers relating to the collection of the amount assigned. The controversy relates to the priorities between the said assignment and the said liens, the assignees claiming priority by reason of the prior execution and delivery of the instrument of assignment. No question is raised as to the consideration for the assignment. It was treated by counsel as a transfer upon full and adequate consideration and without any suspicion of fraud. When the assignment was made permission was sought to the making of it from the city of Newark for the reason that the Stewart & Abbot contract contained the following provisions:

**"SUBLETTING.**

"The contractor agrees that he will give his personal attention to the fulfillment of this contract; and that he will not assign or sublet the aforesaid work, or any part thereof, but will keep the same under his personal control and that he will not assign by power of attorney or otherwise, any of the moneys payable under this agreement unless by and with the previous consent in writing of the Board of Street and Water commissioners signified by resolution of said Board."

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"PAYMENTS.

"\* \* \* At the end of one year the said ten per centum or such portion of it as may remain after making said repairs or remedying any defects, shall be paid to the contractor, after the party of the second part shall furnish the said Board of Street and Water commissioners with satisfactory evidence that all persons who have done work or furnished materials under this agreement, and who may have therefore given written notice to said Board of any balance unpaid for work or materials furnished or done on said work have been fully paid or satisfactorily secured. And in case such evidence is not furnished as aforesaid, such amounts as may be necessary to meet the claims of the persons aforesaid may be retained from the money due the party of the second part under this agreement until the liabilities aforesaid shall be fully discharged or such notice withdrawn."

The city of Newark, by the board of street and water commissioners, the board having charge of the work under the Stewart & Abbot contract, did consent to the said assignment. This consent was contained in a resolution of that board which was adopted on November 17th, 1904, and approved by the mayor of the city on the following day. This resolution was as follows:

*"Resolved, That the consent of the Board of Street and Water Commissioners for the city of Newark, be and the same is hereby given to the assignment by Stewart & Abbot, contractors for the construction of the Cedar Grove reservoir, of all the moneys due and to become due under their contract with the city of Newark for work done and materials furnished under the said contract, and in execution of the same, to Alexander M. Stewart and James C. Stewart, upon obtaining and filing with the Clerk of this Board the consent in writing of the American Surety Company, surety for the performance by the said Stewart & Abbot of their said contract and further upon their complying fully with such other conditions as the city counsel may require to fully protect the interests of the city in the premises."*

On the day on which this resolution was approved by the mayor, viz., November 18th, 1904, Stewart & Abbot joined with the assignees, Alexander M. Stewart and James C. Stewart, in a bond to the city of Newark to indemnify the city against loss or damage for having given such consent; the surety company gave its consent on November 28th, 1904. These various documents were transmitted to the city auditor and he was notified by the city counsel by letter on December 14th, 1904, that all the con-

ditions which had been imposed by him in pursuance of the resolution of the board of street and water commissioners had been complied with fully. The defendants Alexander M. Stewart and James C. Stewart, assignees, claim that the assignment of the Stewart & Abbot funds to them took effect on the day of the date and delivery of the instrument of assignment, and that if any notice of the assignment to the city of Newark was necessary, such notice was given prior to the filing of the complainant's lien, and that notice must be implied from the above recited resolution of the board of street and water commissioners approved by the mayor not later than November 18th, 1904. The complainant claims that notice to the city was essential to the validity of the assignment, and that such notice cannot be said to have been given until December 14th, 1904, that being the date when the city counsel notified the city auditor that all his requirements had been met, this being based upon the complainant's construction of the provisions of the Stewart & Abbot contract above recited, and such construction being that no valid assignment of the Stewart & Abbot fund could be made without the consent of the city.

From the foregoing facts I conclude: *First*, that the assignment took effect from the date of its execution and delivery; *second*, that no notice to the city was necessary to constitute the assignment a valid transfer of the fund; *third*, that the lien claimants are not in the position of *bona fide* purchasers without notice for value, and do not take priority over the assignment; *fourth*, that the consent of the city to the assignment was not necessary to give it force and validity. The authorities for these propositions are as follows: In *Board of Education v. Deparquet*, 50 N. J. Eq. (5 Dick.) 234, the facts were similar to those in this case. There the contest was between an assignee of a fund arising out of a building contract and divers creditors of the contractor. The assignment was made in February, 1887. The lienors claimed under an attachment issued out of the Monmouth circuit court in March of the same year. Vice-Chancellor Pitney discusses the question of the priorities at length and with great learning, and decides that the assignment which was prior in point of execution and delivery took precedence over the latter

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attachment; that notice thereof to the debtor was not necessary to its validity and that the attaching creditor did not occupy the position of a *bona fide* purchaser without notice, and that he had no better title than the debtor himself had. This case was mentioned with approval by the court of errors and appeals in *Miller v. Stockton*, 64 N. J. Law (35 Vr.) 614; and again in *Cogan v. Conover Manufacturing Co.*, 69 N. J. Eq. (3 Robb.) 809, and may, therefore, be taken as an expression of the law of this state. The same doctrine was previously announced by Vice-Chancellor Green in *Bank of Harlem v. Bayonne*, 48 N. J. Eq. (3 Dick.) 246. In fact, the rule was announced by this court in an opinion by Chancellor Vroom, in 1834, in *King v. Berry*, 3 N. J. Eq. (2 Gr. Ch.) 44, and by Chancellor Green, sitting as ordinary, in 1864, in the case of *Kennedy v. Parke*, 17 N. J. Eq. (2 C. E. Gr.) 415. The office of notice of assignment to the debtor or depository is discussed by Mr. Justice Lippincott in *Miller v. Stockton*, *supra*.

The conclusion reached is not singular. We find the same rule in Pennsylvania, *Noble v. Thompson Oil Co.*, 79 Pa. St. 354; in New York, *Williams v. Ingersoll*, 89 N. Y. 508; and in Massachusetts, *Thayer v. Daniels*, 113 Mass. 129. There appears to be no distinction on principle or in the authorities between the lien created by the statutory action of attachment and the lien created by the statutory provisions of the Municipalities Lien law. Although created by different proceedings the character of the charge upon the property in the hands of the debtor is the same.

While I do not think that notice to the city was essential to the validity of the assignment, yet if such notice were necessary knowledge of all the facts must be implied from the resolution of the board of street and water commissioners of November 17th, 1904. That board was a party to the Stewart & Abbot contract jointly with the city of Newark, and by the law of its creation (*P. L. 1891 p. 249*), became the executive board having supervision of the performance of the contract and the power of drawing upon the city treasury for money to pay what was earned thereunder. Surely a notice to this board would be notice to the city, but the defendants may go further. The



resolution was approved by the mayor, who is the chief executive officer of the city, and knowledge communicated to him in the performance of one of his official acts would undoubtedly be notice to the city.

Nor do I think that the consent of the city was necessary to effectuate the transfer. The contract of the city was obtained by a very formal proceeding, viz., the passage of a resolution by the board of street and water commissioners and its approval by the mayor. This was supposed to be necessary in view of the provisions hereinabove quoted from the Stewart & Abbot contract. It has, however, been held in many cases in this state that provisions of that character are inserted in contracts, not for the benefit of the contractor, subcontractors or materialmen, but for the protection of the city. Vice-Chancellor Van Fleet so held in *Shannon v. Hoboken*, 37 N. J. Eq. (10 Stew.) 123; affirmed, *Id.* 318, and also in *Essex Freeholders v. Lindsley*, 41 N. J. Eq. (14 Stew.) 189. In *Bank v. Bayonne*, *supra*, it was expressly held that a provision of that character did not invalidate an assignment of the money earned under the contract. In *Burnett v. Jersey City*, 31 N. J. Eq. (4 Stew.) 341, the restrictive words were the same as those in the contract under discussion.

In this case the city of Newark, by the use of the paragraph referred to, assumed no obligation; it did not agree that it would protect the subcontractors or materialmen; there is no duty cast upon the municipality in favor of any person; it was not a contract for the benefit of anyone upon which an action at law could have been brought. The protection of the municipality was all that was contemplated.

The subcontract between Stewart & Abbot and Seme contains this provision:

"It is also expressly understood that this present contract is made with full knowledge of both the parties hereto with reference to said contract between Stewart & Abbot and the city of Newark, and that a copy of said contract and said specifications has been presented to said Seme, and that he has read the same and fully understands all the requirements thereof, and that each and every of the terms and provisions of said last mentioned contract so far as applicable to the work herein contemplated shall apply to and control this contract, except where provision is otherwise made in this agreement."

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6 Buch.In re Hannah.

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It was urged on the part of the complainant that by these words all the terms of the Stewart & Abbot contract, so far as they were applicable to the Seme contract, were imported into the Seme contract and became part thereof, and that thereby Seme's creditors obtained a footing which they otherwise might not have had. I am not able to perceive that the connection between these contracts in any way affects the status of either debtor or creditor. Whatever design may have actuated the parties in making the Stewart & Abbot contract a part of the Seme contract is not disclosed, but certainly the city of Newark, the debtor, was not a party to the Seme contract, and its rights are not affected by any provision contained in it.

These views lead to a decree in favor of the assignees, Alexander M. Stewart and James C. Stewart, but inasmuch as the complainant filed its claim and prosecuted it in ignorance of the assignment, costs will be allowed only after the filing of the answer.

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In the matter of PERCIVAL A. HANNAH, found to be a lunatic.

[Decided June 23d. 1909.]

1. Since the statute of Edward III., conferring a right to traverse a lunacy inquisition, has never become a part of the law of New Jersey, such traverse will only be allowed in the exercise of judicial discretion.

2. The son of the subject of a lunacy inquisition has an actual *bona fide* interest therein entitling him to intervene to protect the parent.

3. A traverse of a lunacy inquisition is only available on an allegation that lunacy has been untruly found and cannot be availed of so as to obtain the release of a lunatic on the ground that he has recovered sanity.

4. Under act of April 2d, 1898 (*P. L. 1898 pp. 220, 221*), as amended by act of June 12th, 1906 (*P. L. 1906 pp. 679, 681*), providing that insane persons shall be confined until restored to reason or removed or discharged according to law, the authorities in charge of an insane asylum should release a person committed from confinement on his restoration to reason.

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In re Hannah.76 Eq.

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5. Where a person committed to an insane asylum is restored to reason, and the authorities refuse to discharge him, he may be enlarged on *habeas corpus* sued out of the chancery or common-law court under act of April 2d, 1898. *P. L. 1898 p. 231.*

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On application for leave to traverse inquisition.

*Mr. John W. Wescott*, for the motion.

WALKER, V. C.

On October 17th, 1908, a commission in the nature of a writ *de lunatic inquirendo* was issued out of this court to inquire into the lunacy of Percival A. Hannah, of the county of Salem. The inquisition was taken on November 2d and returned on November 7th, 1908, the subject, Percival A. Hannah, being found to be a lunatic and of unsound mind and that he did not enjoy lucid intervals, so that he was not capable of the government of himself, his lands, tenements, goods and chattels, and that he had been in the same state of lunacy for the space of one month then last past and upwards.

On December 15th, 1908, a decree was made confirming the proceedings and ordering the transmission of the record to the orphans court of the county of Salem.

And now, June, 1909, Norman H. Hannah, of Philadelphia, in the State of Pennsylvania, a son of Percival A. Hannah, the lunatic, petitions and shows that his father has since been and still is confined in the Cumberland County Insane Asylum, and avers that his lunacy was acute and that he has now so far recovered that his mental faculties are in healthy and normal condition, and his physical state such as to enable him to attend to his affairs, and he prays that his father may have leave to traverse the inquisition or that an issue may be awarded to try the fact of his lunacy.

By the common law no traverse of the inquisition was allowed, but right to traverse was first granted by statute in the time of Edward III. *Shelf. Lun. 113*. The statute of Edward never has become a part of the law of this state. *Lindsley's Case*, 46 N. J. Eq. (1 Dick.) 358, 364. With us a traverse will be allowed only upon the exercise of sound judicial discretion. *Ibid.*

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6 Buch.In re Hannah.

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By the English practice a lunatic might traverse the inquisition either in person or with the chancellor's permission by attorney. *Shelf. Lun.* 118. And where the lunatic was confined in prison for debt, and a petition to traverse had been presented, the lord chancellor ordered a *habeas corpus* to bring the lunatic before the chancellor at the sitting of the court two days afterwards. *Ibid.* And the party may apply either in person to the chancellor to be inspected or his friends may sue out a writ returnable in chancery for that purpose. *Ibid.* 119.

In the matter of *Heli, a lunatic*, 3 Atk. 635, Lord Chancellor Hardwicke had before him the question whether a person could traverse an inquisition of lunacy without bringing the lunatic in *propria persona* before the court, and he observed that as to an inquisition *de idiota*, the subject may in person or by his friends come into chancery and show the matter and pray that he may be examined before the chancellor, and if, upon examination, he be found no idiot, then the inquisition shall be taken as void. He held that the same practice obtained with reference to lunacy.

In *Covenhoven's Case*, 1 N. J. Eq. (Saxt.) 19, Chancellor Vroom said (at p. 21): "It is clear that a stranger has no right to interfere in a proceeding of this nature. He can neither sue out a commission, nor can he make himself a party to it by any application he may make to this court. I take it to be equally clear, that when a person has actual interests, either equitable or legal, which are affected by the inquisition, he may apply to this court for relief." The chancellor was dealing with the case of one who had acted as attorney in fact for the lunatic, and who alleged that by reason of the finding of the jury he was greatly endangered in the matters transacted by him as attorney. The chancellor considered that the attorney's petition should be dismissed, but remarked (at p. 23): "Taking all cases together, it is fairly to be inferred, as I think that applications on the part of third persons, in matters of this nature, are not to be encouraged, yet that they will be listened to and granted when actual *bona fide* interests and rights are endangered." The petitioner for this traverse is certainly a stranger to the proceedings, but, as the son of the subject of the inquisition, he has an actual *bona fide* interest, filial and sentimental rather than substantial,

though it may be, to have the question of his father's lunacy tried out.

It would be an anomaly, indeed, if children could not intervene to protect parents declared to be lunatics in these proceedings on inquisition.

But, assuming the verity of the allegations in the petition under consideration, still, the subject of the inquest is not entitled to traverse the inquisition. That remedy is available only on an allegation that lunacy has been untruly found. *Shelf. Lun. 113, 114*. Where a party is aggrieved by the finding of an inquisition of lunacy, the proper procedure is by a direct appeal to the court by means of a traverse. *10 Encycl. Pl. & Pr. 1202*. As the petition does not deny that lunacy was properly found, but, on the contrary, admits the insanity of the subject at the time of office found by the assertion that the lunacy was acute and that the subject has now recovered, no case for a traverse is presented.

On this application it is not shown whether a guardian was appointed for the lunatic by the orphans court to which the proceedings were transmitted according to the statute, and the application is not one in form to supersede the inquisition under our practice, in which cases it is the usual course to refer the matter to a master to take proofs as to the state of mind of the petitioner, and to report the proofs with his opinion thereon. *In re Rogers, 5 N. J. Eq. (1 Hal. Ch.) 46; In re Price, 8 N. J. Eq. (4 Hal. Ch.) 533; In re Weis, 16 N. J. Eq. (1 C. E. Gr.) 318; In re Ellis, 62 Atl. Rep. 702*.

If, as alleged in the petition, the subject has now recovered from his lunacy, he is entitled to be liberated under the statute. Our act concerning the commitment of insane persons to hospitals provides that such persons shall be confined therein until restored to reason or removed or discharged according to law. *P. L. 1898 p. 220 (bottom of p. 221); amended, P. L. 1906 pp. 679, 681*.

If Mr. Hannah has been restored to reason and the authorities of the institution in which he is confined refuse to discharge him, he may be enlarged on *habeas corpus*, and the proceedings may

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6 Buch.Servis v. Dorn.

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be had before the judge of a common law court, or this court. *P. L. 1898 p. 231; In re Lee, 55 Atl. Rep. 107.*

Unless the petitioner chooses to pursue the remedy by *habeas corpus*, an application to supersede the inquisition upon the ground of the restoration to sanity of the subject of the inquest will be entertained. The application for a traverse must be denied.

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ALBERT SERVIS

v.

JOHN H. DORN et ux., et al.

[Decided July 12th, 1909.]

1. Surplus money arising upon a sale of land under a decree of foreclosure stands in the place of the land itself in respect to liens upon or vested rights therein.

2. When husband and wife hold lands by an estate in entirety, the wife, during the joint lives of herself and husband, is entitled to her share of the usufruct of the land, and the right of survivorship in the fee still exists as at common law.

3. Judgments recovered against a husband, who, together with his wife, owns land by an estate in entirety, are liens against the husband's interest and are enforceable against the land if he survives his wife, but are subject to be defeated as to that land in the event of her surviving him.

4. Surplus money, arising upon a sale of land owned by husband and wife by an estate in entirety, will not be paid to the husband and wife upon their petition when there are judgments against either one of them, but will be held under the control of the court to wait the severance of the estate by the death of one of the parties, when the fund will or will not become available in satisfaction of the judgments, accordingly as the judgment debtor survives or dies before the other tenant by entirety.

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On petition for surplus money.

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*Mr. Warren R. Schenck*, for the petitioners.

*Mr. John A. Coan*, for the South River Brick Company.

*Mr. George S. Silzer*, for August Splatter.

WALKER, V. C.

The defendants John H. Dorn and Rosie Dorn, his wife, were the owners of an estate by the entirety in the fee to the mortgaged premises sold in this cause. By the report of the master in the foreclosure proceedings it was certified that the defendant the South River Brick Company had obtained a judgment against the defendant John H. Dorn for principal, interest and costs, amounting to \$90.12, and that the defendant August Splatter had obtained a judgment against the defendant John H. Dorn for principal, interest and costs, amounting to \$24.78, in the order of priority just mentioned, but that the said two judgments are not at the present time liens upon said mortgaged premises, inasmuch as the said John H. Dorn and Rosie Dorn, his wife, the owners thereof, are seized of said lands and premises by an estate in entirety.

By the final decree it was adjudged that the master's report and all the matters and things therein contained do stand ratified and confirmed, and that there was due to the complainant on his mortgages the sum of \$1,041.09, and to the South River Brick Company on its judgment against John H. Dorn the sum above mentioned, and to the defendant August Splatter, on his judgment, the sum above mentioned; and it was further adjudged that the mortgages of the complainant are first in priority of lien over the respective judgments of the defendant South River Brick Company and August Splatter, and are entitled to be first paid, and that so much of the mortgaged premises as necessary should be sold to pay and satisfy, in the first place, the amount due the complainant with interest and costs, and that a writ of *feri facias* issue for the sale of the mortgaged premises, and that out of the money arising from such sale the sheriff, in the first place, pay to the complainant his debt, interest and costs, and in case more money should be raised by the sale than shall

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be sufficient to answer such payment, that such surplus be brought into court to abide the further order of the court. The sum of \$124.44 has been deposited with the clerk as the surplus money arising upon the sale under the *fi. fa.*

Surplus money arising upon a sale of land under a decree of foreclosure stands in the place of the land itself in respect to liens upon or vested rights therein. *Matthews v. Duryee*, 45 Barb. 69; *Oberle v. Lerch*, 18 N. J. Eq. (3 C. E. Gr.) 346; *Leeming's Case*, 3 De G. F. & J. 43.

The defendants Dorn and wife, the owners of the fee by entirety, have petitioned for the surplus money, and their counsel contends that they are entitled to it because the matter is *res judicata*, that is, that it has been adjudicated that the judgments were not liens upon the land, and that, consequently, they are not liens upon the surplus money.

It is true that the master reported that the judgments were not at the time of making the report liens upon the mortgaged premises, but the finding may be said to be somewhat ambiguous, and is not inconsistent with the view that the judgments, while not then enforceable by sale of the premises, were, nevertheless, inchoate liens against the estate of the defendant John H. Dorn which would come to him if he survived his wife.

There can be no doubt whatever but that the judgments were liens upon the interest which the husband (the judgment debtor) had in the land. In *Washburn v. Burns*, 34 N. J. Law (5 Vr.) 18, a lien claim was filed against premises owned by a husband and wife in entirety, and the question was whether in such a case the husband could burden such an estate with a mechanics' lien.

Said Chief-Justice Beasley, speaking for the supreme court (at p. 20):

"The argument was, that as the wife was seized of an indivisible entirety, there was nothing left upon which the grant of the husband could act. This argument is sound only to a limited extent. Its error consists in leaving out of the account an element of the case. It is true that the husband cannot alien any part of the estate which he holds in the same right with his wife. To do that would be to sever its unity and thus destroy its peculiar characteristics. The reason he cannot do this is be-



cause it would convert the estate into a tenancy in common, and defeat the right of survivorship. But the husband has an interest which does not flow from the unity of the estate, and in which the wife has no concern. He is entitled to the use and possession of the property during the joint lives of himself and wife. During this period the wife has no interest in or control over the property. It is no invasion of her rights, therefore, for him to dispose of it at his pleasure. The limit of this right of the husband is, that he cannot do any act to the prejudice of the ulterior rights of the wife."

That case (*Washburn v. Burns*) was decided in 1869 and affected a conveyance made to the husband and wife in 1858. As a matter of fact the estate of the parties was controlled by the Married Woman's act of 1852 (which appears to have been overlooked), and the wife of McCabe, one of the defendants, was entitled to the enjoyment of her estate or interest in the lands during the joint lives of herself and her husband. *Buttler v. Rosenblath*, 42 N. J. Eq. (15 Stew.) 651, 656; *Vunk v. Raritan River Railroad Co.*, 56 N. J. Law (27 Vr.) 395, 398; *Collins v. Babbitt*, 67 N. J. Eq. (1 Robb.) 165, 175. These cases decide that the wife during the joint lives of herself and husband is entitled to her share of the usufruct of the land, and that the right of survivorship in the fee still exists as at common law. But, under *Washburn v. Burns*, *supra*, and the earlier case of *Den v. Gardner*, 20 N. J. Law (Spenc.) 556, the husband's interest may be encumbered, either voluntarily by mortgage as in *Den v. Gardner*, or involuntarily by judgment as in the mechanics' lien claim case of *Washburn v. Burns*.

My interpretation of the master's report in the foreclosure proceedings is, that by certifying that the two judgments were not then liens upon the mortgaged premises, he meant no more than that they were not liens on the entirety of the fee in such way that they could be paid and discharged out of the proceeds of the sale of the premises, and this is borne out by the fact that he reported the amounts of the judgments and their order of priority. This leads to the view that the master, to whom was referred the petition of Dorn and wife for the surplus, erred in his conclusion that the judgments of the South River Brick

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Company and August Splatter are not liens at all against the surplus money or any part thereof, which conclusion he predicates upon the former master's report, and appears to consider the matter *res judicata* as against the judgment creditors by reason of the final decree which confirmed the report. True, whatever was reported is a thing adjudicated by the decree, but, as pointed out, the report does not bear the interpretation put upon it.

The result reached by me is, that these judgments are liens upon the interest of the defendant John H. Dorn in the fund in court, which fund must be considered to be held by himself and wife in an estate by entirety, the same as was the land before its sale under foreclosure.

The fund will not be paid to Mr. and Mrs. Dorn upon their petition therefor, but it will be held under the control of the court to wait severance of the estate by the death of one of the parties, when it will or will not become available in satisfaction of the judgments, accordingly as the judgment debtor survives or dies before the other tenant by entirety.

The petition for surplus will be dismissed.

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GEORGIA M. ALLEN

v. .

JACOB C. ALLEN, executor of Elijah P. Allen, deceased.

[Decided July 12th, 1909.]

1. At the time of making his will the testator's estate consisted of certain securities (bonds and mortgages) of which he thereafter died possessed. In the second item of his will he provided as follows: "I do give and bequeath unto my wife Georgia M. Allen, the sum of \$17,000.00, to be paid to her out of the securities which I now hold, instead of cash." —*Held*, that the legacy is a specific one, and is to be paid out of the securities which came to the executor as part of the estate of the testator.

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2. A specific legacy carries with it the income thereof from the death of the testator.

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On motion to strike out bill.

*Mr. George M. Shipman*, for the motion.

*Mr. William H. Morrow*, *contra*.

WALKER, V. C.

The bill alleges that the complainant is the widow of Elijah P. Allen, who died January 14th, 1908, leaving a will in which appears the following item:

*"Second—I do give and bequeath unto my wife, Georgia M. Allen, the sum of seventeen thousand dollars to be paid to her out of the securities which I now hold, instead of cash."*

The third item is a bequest of \$1,000 to the testator's niece, to be paid in like manner as the bequest to the wife in the second item. Following this bequest the testator gave to certain nephews and nieces, and to another person, legacies of \$100 each. The residue of his estate he gave to his brother, the defendant, whom he constituted his executor, and ordered and directed him not to make or file any inventory or appraisal of his estate, and he, testator, assumed the power to provide that he, the executor, should not be required to file any account as executor in any court or place whatever. The will was executed November 30th, 1907, and was admitted to probate January 27th, 1908.

The bill further alleges that the testator left him surviving the complainant, his widow, but no child or children, his next of kin being the nephews and nieces mentioned in his will, and his brother the defendant; that at the time of his death the estate of the testator consisted of bonds secured by mortgages on real estate, all of which were at the time the testator made his will known to him to be good investments, and out of which he intended his executor, immediately after his death, to deliver to the complainant \$17,000, principal sum, and that the executor could have, in that manner, discharged the bequest to the com-

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6 Buch.Allen v. Allen.

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plainant and also the one to his niece, and that there would have been left in his hands more than \$6,000, principal of mortgages, after paying all debts, legacies, expenses of administration, and every other obligation against the estate of the testator at the time of his death—the total amount of bonds and mortgages left by him, principal sum, at the time of his death exceeding the amount of \$26,000; that the will was made during the last illness of the testator, who was about seventy-nine years old, who did not expect to recover, and at a time when he did not contemplate making any change in his investments but fully intended that they should continue in the same securities in which they were; that the complainant had an income from the estate of her former husband, who left her a widow with one daughter, which income amounted to about \$100 a year, and that in making the bequest to the complainant, her husband, the testator, had in mind that her income was insufficient for her support after his death, and that it was his purpose to make provision for her necessities, and that he designed that the interest on the sum of \$17,000 should begin to accrue for her benefit immediately after his death; that all the other legacies and bequests made by the will, and all debts and funeral expenses, have been paid and that there remains in the hands of the executor securities belonging to the estate amounting in value, principal sum, to \$24,000 and upwards; that the executor has received and holds to his own use all the interest accruing on the securities of the estate at the time of the death of the testator, and all that has accrued since his death, and claims that the complainant is not entitled to the securities to the amount of \$17,000, as they were held by the testator at the time of his death, but only to the sum of \$17,000 in such securities at the end of one year from the death of the testator.

The prayer of the bill, as originally drawn, was that a decree might be made construing the will of the testator and directing that the complainant is entitled to receive the sum of \$17,000 in the securities of the estate and in the hands of the executor which came to him after the death of the testator, together with the interest accruing thereon from and after his death, and with the interest on so much and such parts of the interest as the

executor has received since the death of the testator, now in his hands, and for other and further relief.

A motion is now made to dismiss the bill for the following reasons: *First*, because the court has no jurisdiction to make the decree prayed for, there being no prayer for any direction to the defendant named as executor or as an individual, the suit being brought, as appears by the allegations of the bill, for the mere purpose of interpreting the provisions of the will, without any further relief, and by the prayer the only relief sought is the counsel and advice of the court in the construction of a portion of the will, there being no prayer for any positive direction to the executor, or to the defendant named in the will as an individual. *Second*, because the name of the defendant as executor of the deceased is omitted from the prayer to answer, the bill alleging that the defendant has failed in his duty as executor, and the bill seeks a construction of the whole or a portion of the will; and because the prayer for subpoena is that the writ be issued to the defendant commanding him personally, and as executor of the deceased, to appear, there being no prayer that the defendant answer the bill or answer the interrogatories. *Third*, because there is no equity in the bill, the true construction of the will being that the legacy is not a specific legacy, and that the complainant is not entitled to have and receive from the executor the bequest in specie as it existed at the time of the death of the testator, and to include interest on the same from that time, but that the legacy is general or demonstrative and that the widow is entitled to be paid the sum of \$17,000 from the estate of deceased out of the securities that were in existence at the death of the testator, with interest after one year from his death. *Fourth*, because the bill lacks equity, there being no allegations which entitles the complainant to any relief against the defendant or as executor of the deceased.

Before the hearing the complainant, on motion, and by leave of the court, amended the prayer for relief by inserting a prayer that the defendant, as executor, may be decreed to deliver to her securities of the estate of the testator that came to his hands after testator's death, to the amount, principal sum, of \$17,000, together with interest thereon from his death, or, in case the

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*6 Buch.**Allen v. Allen.*

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executor has collected the principal and interest, that he pay the sum or such parts thereof as he may have collected, to the complainant in cash.

This motion to strike out the bill is made under rule 213 of this court, and is equivalent to a demurrer. *Grey v. Greenville Railroad Co.*, 59 N. J. Eq. (14 Dick.) 372. Like a demurrer the motion admits the facts well pleaded in the bill. This being so, the admission is that the testator died possessed of securities, being bonds and mortgages, of the value of \$17,000, which were available to pay the legacy to the complainant in specie, which, being assigned to her, would have been interest drawing securities in her hands from the date of the testator's death, but that instead of satisfying her legacy in that way the executor has refused to make such settlement and claims the complainant is only entitled to \$17,000 from the estate of the testator in securities, to draw interest from one year after the death of the deceased.

In the face of this declination of the executor, the court has the power, certainly under the amended prayer, to decree that the executor carry out the intention of the testator and deliver to the complainant securities of the estate which came to his hands in the principal sum of \$17,000 so that she may receive interest thereon from the date of the testator's death, or, if the executor has received such interest, or any part of it, that he turn that over in addition. In this posture of the case I fail to see that the bill is one merely for a construction of the decedent's will without any direction to the executor to perform a duty. On the contrary, it seems to me, plainly, that the case is one for the direction to perform a duty following and arising out of a construction of the will, if that construction be favorable to the complainant. Besides, under our liberal practice of amendments, in a suit in equity, after issue joined and after witnesses have been examined, the complainant is permitted to amend by adding proper parties, where there is a defect of parties. *Seymour v. Long Dock Co.*, 17 N. J. Eq. (2 C. E. Gr.) 169. Even on final hearing the complainant will be allowed to amend if thereby no right of defence is abridged. *Ogden v. Thornton*, 30 N. J. Eq. (3 Stew.) 569.

If the complainant had not amended her bill she would be permitted to do so now, to the end that the substance of the motion could be considered and the cause disposed of on its merits. If there remains any technical defect in the prayers amendment will be allowed.

This brings me to the consideration of the real question at issue, which is, is the legacy of the complainant a specific or demonstrative one?

As to whether a legacy is specific or demonstrative Vice-Chancellor Emery, in *Blair v. Scribner*, 65 N. J. Eq. (20 Dick.) 498, quotes from the decision of Chancellor Kent (at p. 518), as follows:

"The reasoning on this subject is, that if the legacy is meant to consist of the security, it is specific, though the testator begins by giving the sum due upon it. A legacy of a debt, unless there is ground for considering it a legacy of money and that the security is referred to as the best mode of paying it, is as much specific as the legacy of a horse or any movable chattel whatever. If the specific thing is disposed of or extinguished the legacy is gone. \* \* \* It is essentially a question of intention when we are inquiring into the character of a legacy upon the distinction taken in the civil law between a demonstrative legacy, where the testator gives a general legacy but points out the fund to satisfy it, and where he bequeaths a specific debt."

The learned vice-chancellor continues that courts incline to consider legacies opening with the bequests of sums of money to be general or demonstrative rather than specific, and that a clear intention must appear in order to make a legacy specific, citing authorities.

This case (*Blair v. Scribner*) was reversed in the court of errors and appeals, because that court held that the true construction of the will there under consideration led to a different conclusion than that reached in this court, but did not in anywise depart from the law concerning specific or demonstrative legacies laid down by the vice-chancellor. In fact, in direct affirmance of what he said, the court of last resort remarked that it is a primary rule in the construction of wills that a clear intention on

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the part of the testator must appear in order to make a legacy specific. *Blair v. Scribner*, 67 N. J. Eq. (1 Robb.) 583, 588.

To my mind, the intention of the testator in the case now under consideration to make the legacy to his wife specific and not demonstrative is so clear upon its face that resort does not have to be had to the other parts of the will or the situation of the parties as an aid in interpretation.

My reason for saying that the testator's intention to make the legacy in question a specific one clearly appears, is, that his direction that the legacy shall be paid out of securities "instead of cash" puts the matter in such posture that the payment must be made in the securities mentioned in order to effectuate and carry out his intention. These words "instead of cash" are, in my judgment, absolutely controlling, and are evincive of the clearest intention that the legacy was payable in the very securities which he held at the time of making the will to the end that his widow should have the income yielded by them from the time of his death.

As is well known, a specific legacy carries with it the income thereof from the death of the testator. *Theob. Wills* 180; *Blundell v. Pope*, 21 Atl. Rep. 456.

The motion to strike out the bill must be overruled, with costs.

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COPPER KING OF ARIZONA

v.

DANIEL ROBERT.

[Decided July 13th. 1909.]

1. It is the practice of the court of chancery, arising out of its general jurisdiction for the purpose of discovery, to allow a party to apply before the hearing of a suit, for the inspection of documents, relevant to the matters in question, which are in the possession or power of the opposite party; and this discovery is allowed to a defendant, when necessary to



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enable him to complete his defence; but it is not unlimited, and will be extended only to such documents as appear to be necessary for the purpose of enabling the suitor to plead properly.

2. The circumstance of the documents being abroad is no answer to an application for their production; but, in such a case reasonable time will be given the party to bring them into the state, and refusal to comply with the order will be considered the same as if the documents were here and the party refused to produce them.

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On petition to compel the production of the books of the complainant corporation for inspection by defendant.

*Messrs. Dungan & Reger*, for the petitioner.

*Mr. Pierre F. Cook, contra.*

WALKER, V. C.

The late Daniel Robert filed a demurrer in this cause which was overruled. He died pending decision on the demurrer, and Angeline Robert, his executrix, was made a party defendant in his stead. She claims that she has no knowledge of the facts alleged in the amended bill and is unable to formulate a proper pleading without an examination and inspection of the books of the complainant, a corporation organized under the laws of the Territory of Arizona and which has no office in this state. She avers that on June 10th, 1909, her solicitor called upon the solicitor of the complainant at his office in Jersey City and requested from him permission to examine and inspect the books of the complainant then in his possession (not stating what books, if any, were in his possession), and that such permission was refused. She says she believes that the suit was never authorized by the corporation, but that it has been brought in its name by individuals who had no authority, and that in 1904 all the property and assets of the complainant were sold and that thereupon it ceased to transact business. The prayer of the petition is that this court compel the complainant to bring into this state all the minute books, stock books, transfer books, books of account, including cash books, day books, journals, ledgers and all other books, receipts, documents and vouchers showing the business

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transactions of the complainant from its incorporation to the present time, and to permit the attorney and solicitor of the petitioner to make an examination thereof under such restrictions as the court may impose.

Section 44 of the Corporation act is invoked as authority for the order prayed for. An examination of that section will show that it gives this court authority only to summarily order brought into this state the books of corporations organized under our laws. This being so, the section is not available on the present application.

But, the petitioner further urges that, irrespective of the statute, this court has the inherent power to direct the complainant to give her an inspection of its books, and cites *Lawless v. Fleming*, 56 N. J. Eq. (11 Dick.) 138, 815, as authority. The case bears out the petitioner's contention. Said the court of errors and appeals in that case (at p. 816) :

"The right of the court of chancery to make such an order cannot be questioned, and has long been settled both by established custom and well-known authority. It is one of the inherent powers of a court of equity."

In *Dan. Ch. Pl. & Pr.* (6th Am. ed.) it is stated that it is the practice of the court of chancery to allow a party to apply before the hearing of a suit, for the production of documents relevant to the matters in question, which are in the possession or power of the opposite party; that this power to order the production of documents arises out of the general jurisdiction for the purpose of discovery, which, in all proceedings in equity, constitutes an important feature, and, in some instances, forms, as it were, the very foundation for the interference of the court; that the mere circumstance of the documents being abroad is no answer to an application for their production, but in such a case, reasonable time is given the party to bring them into the country, and refusal to comply with the order is considered the same as if the documents were here and the party refused to produce them; that where discovery from the complainant, either concerning matters of fact or the contents of documents was necessary to a defendant for the purpose of enabling him to complete his defence, such discovery was formerly had by means of a cross-

bill, but under the present practice the court may make an order for the production by the complainant of such documents in his possession or power relating to the matters in question in the suit as the court shall think right, but this discovery is not unlimited and will be extended only to such documents as appear to be necessary for the purpose of enabling the suitor to plead properly. *Dan. Ch. Pl. & Pr. (6th Am. ed.), \*1817 et seq.*

In the light of the rule above mentioned, I do not see how the petitioner is entitled to an inspection of all the books, receipts, documents and vouchers showing the business transactions of the complainant from its incorporation to the present time as prayed for.

Let us see now what are the allegations of the bill, and what its prayer, so that we may ascertain what documents of the complainant the defendant needs to inspect.

The bill avers that Daniel Robert, the defendant's testator, was treasurer of the complainant corporation, and that he, together with its president, controlled the financial policy of the company; that immediately after its organization the complainant became financially straitened and sorely in need of funds to carry on its business, and thereupon the defendant's decedent, in conjunction with the president and his brother, entered into a financial policy that would accrue to their own private benefit and the injury of the complainant, by causing it to execute a mortgage to Richard D. Boitel (brother of the president), trustee, for \$10,000, the actual consideration therefor being \$4,000 loaned, which was subsequently repaid with a bonus of \$4,000, and by causing the corporation to execute another mortgage to the same mortgagee, trustee, covering the same land for \$10,000, the actual consideration therefor being \$4,500, and that the defendant's testator participated in the bonuses with the other parties, and that he became and (his estate) now is liable to the complainant for all loss occasioned thereby; that the complainant is entitled to an account of the moneys received by the defendant as mentioned, or by any other of the directors of the complainant corporation or any other person with his knowledge or concurrence. The prayer is that the defendant may be

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decreed to account for such money as was paid to or received by him (in his lifetime), or paid to or received by any other agent or director of the complainant company or any other person with his consent, out of the assets of the complainant by way of bonus over and above any sum or sums actually advanced to it under the mortgages or either of them.

The minute book will show whether or not the suit was authorized to be brought by action of the board of directors, and the defendant is entitled to an inspection of that book. The defendant is also entitled to an inspection of such entries in any other books of the corporation as show the mortgage transactions to which reference has been made. Also, she is entitled to an inspection of such receipts, documents and vouchers as bear upon the particular transactions.

An order will be advised that the complainant produce at the office of its solicitor in Jersey City, for the inspection of the defendant, its minute book, and such other books as contain entries which show the mortgage transactions, and such receipts, documents and vouchers as bear upon those transactions. Inspection must be restricted to an examination of such data in the books and documents to be produced as relate to the particular transactions which are made the subject-matter of the bill of complaint. The defendant will have twenty days in which to plead or answer the bill after production and inspection by her or her solicitor, and in the meantime all proceedings in the cause shall be stayed. By demanding the production of more documents than she is entitled to inspect the defendant has disentitled herself to the costs of this motion. The order will be made without costs to either party as against the other.

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JOHN McMILLAN et al.

v.

LOUIS KUEHNLE and EDWARD BADER.

[Decided September 14th, 1909.]

1. The playing of baseball on Sundays will be enjoined if it be made to appear that the noise and disorderly conduct attendant upon the games being held forth amounts to a nuisance in the neighborhood, whereby the peace and quiet of the Sabbath is disturbed and the rest which the complainants are entitled to enjoy on that day is appreciably affected; each case must stand or fall on the question of nuisance or no nuisance, as the court of chancery has no jurisdiction to enforce, by injunction, the Sunday laws, so called.

2. Noises which are not nuisances on a week-day may be nuisances when made on a Sunday, if they have the effect of disturbing that quiet and rest which the citizen is entitled to have for his recuperation; and the fact that such noises are forbidden by the laws of the land (the Sunday laws) takes away any defence for the making of them on Sunday even though they be but slight.

3. A preliminary injunction will issue to restrain Sunday baseball playing upon the affidavits of six or seven persons residing in the neighborhood where the games are held forth, which show a case of nuisance, even though more than forty persons similarly situated swear that the noises are quite inappreciable and not at all disturbing, if there be no proof before the court that the complainants are morbidly sensitive; the case not being one turning upon the preponderance of evidence as to the extent and character of the noise so much as it does but upon the question whether the affidavits on behalf of the defendants show the affiants on behalf of the complainants to be untruthful as to the existence of the noise, and as it is notorious that many people are not disturbed by noises which affect some people similarly situated, in the absence of proof that the complainants and their witnesses are morbidly sensitive, it will be presumed that they are persons of ordinary sensibility and are truthful concerning the existence of the nuisance as to themselves.

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On application for preliminary injunction. Heard on bill and affidavits, and affidavits on the part of the defendants.

*Mr. Charles E. Sheppard* and *Mr. Edwin G. O. Bleakly*, for the complainants.

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*Mr. George A. Bourgeois, for the defendants.*

WALKER, V. C.

The bill is filed by John McMillan and John H. Goldsmith, on behalf of themselves and other residents of Atlantic City, among them being those whose affidavits are annexed to the bill. Those making affidavits besides the two complainants are: Mrs. Ellen Goldsmith, wife of one of the complainants; Robert Ingram, and Harriet A. Ingram, his wife; Mrs. Frances Young and Mrs. Mary Reynolds.

The object sought by the bill is to restrain the defendants from holding forth baseball games at Inlet Park, Atlantic City, on Sundays, because of an alleged nuisance attendant thereon by way of noise and disorderly conduct which disturbs the peace and quiet of the Sabbath, and interferes with the rest to which the complainants are of right entitled to enjoy on that day.

The case stands or falls on the question of nuisance or no nuisance, as the court of chancery has no power to enforce, by injunction, the Sunday laws, so called. That jurisdiction belongs to another tribunal.

The complainant Mr. McMillan, who is a clergyman, swears that baseball games had been carried on at Inlet Baseball Park, Atlantic City, for some five or six Sundays before the making of his affidavit, which was on August 25th ult. (1909); that his residence is about two squares from the park, and that large crowds attend the games, and that in going to and returning therefrom make loud noises and sounds which are an annoyance to himself and the neighborhood, and a disturbance of the peace and quiet of the neighborhood, but he says nothing about sounds emanating from the grounds; he also says that quite a large number of the boys in his Sunday-school absent themselves, and attend the games on Sabbath afternoons. With this last feature of his complaint the court has nothing to do.

The complainant Goldsmith swears that he lives about a block and a half, or six hundred feet, from the park, and that on Sunday afternoons crowds of people in carriages, in automobiles and on foot, pass by, to and from the games, making loud noises, and that during the progress of the games there is frequently heard

very loud cheering and shouting, yelling and screaming and stamping of feet on the stands, all of which is very plainly heard at his residence and is greatly annoying and interferes with the comfort of his house for himself and his family, and destroys the peace and quiet of the neighborhood during the time.

Mrs. Ellen Goldsmith swears that she has been greatly annoyed in her house and her peace and comfort greatly disturbed by the noise and confusion made by those going to and returning from the ball games at the park on Sundays, and by the cheering and screaming, yelling and hooting, and stamping of feet on the boards by those within the park attending the games.

Robert Ingram swears that he resides about one and a half squares, or two hundred yards, from the park, where baseball is played on Sundays, and that a large number of teams, automobiles and carriages, loaded with men and women, who, with many others on foot, going to and returning from the games, pass along the street in front of his residence, cheering, hooting and shouting, and that during the progress of the games the cheering, shouting and screeching of the crowds attending are plainly heard at his residence and greatly annoy himself and his family.

Mrs. Harriet A. Ingram, wife of Robert Ingram, swears that since the baseball games have been carried on at the park on Sundays, noise and confusion, screaming, cheering and hallooing of the crowds of people in the park while the games were on, and the stamping of feet on the stands by the spectators were plainly heard at their house and disturbed the peace and quietness of Sunday for them; that the crowds of people on foot and in carriages and automobiles, passing along in front and near to their residences, going to and returning from the games on Sundays, also greatly disturbed the comfort of their house and its peace and quiet.

Mrs. Frances Young swears that she lives with her husband and family of children about one and a half squares from the park; that the cheering, hallooing and shouting of persons attending the ball games on Sundays can be plainly heard at their residence and is very annoying and disturbs the peace and quiet of their home; that the crowds, going to the games and returning from them, pass by their home in large numbers, many of them

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shouting and using profane and vile language, which can be plainly heard from their house, and is a great annoyance and nuisance to them.

Mrs. Mary Reynolds swears that she resides about two blocks or squares from the park where the games of baseball are carried on on Sundays, and that teams, automobiles and foot people go by her house, to and from the games, and make a loud noise, disturbing herself and the neighborhood.

The proofs on the part of the defendants, who admittedly control and operate the Inlet Baseball Park, show that lands near or adjoining the park are used as a terminal of the trolley line (which extends from Longport to the inlet), where its terminal building and waiting-room and also a hotel and restaurant, around which is a two-story pavilion, and another hotel, are situate; also, nearby, is a pier from which approximately one hundred sailing yachts, of various sizes, make daily or hourly excursions or trips down Absecon inlet and out upon the Atlantic ocean, which yachts daily carry great numbers of people, extending into the thousands, on sailing trips, great numbers of people taking those trips on Sunday afternoons; that great numbers of people visit the hotels, or one of them, especially on Sundays, and enjoy the refreshments that may be purchased; that there are automobile lines running from various parts of the city to the inlet, and that large numbers of busses carry people to and fro, and that the majority of the people who go to the inlet from the boardwalk along the Atlantic ocean reach it by automobiles and busses, the trolley line not touching the boardwalk except at two points.

The affidavits of over forty people living near to the park were produced, many of them living much nearer than those whose affidavits are annexed to the complainants' bill, who swore that none or very little noise or applause was heard coming from the baseball park, while games were held forth there, and that what was heard was no annoyance whatever to people living in its vicinity, nor was the conduct on the part of the crowds going to or returning from the inlet on Sundays of the character mentioned by the complainants' witnesses; in fact, that it was not annoying.



If the issue were as to a certain well-defined physical fact presumably within the knowledge of all of the affiants—such as, did a certain sound occur at midday or midnight—the defendants would prevail upon the clear weight and preponderance of the evidence; but, the issue is as to facts not so clearly defined, but is as to facts which different people see and hear differently, according to their different natures.

The criterion for determining whether or not a particular use of property is a nuisance, is its effect upon persons of ordinary health and sensibility, and ordinary modes of living, and not upon those who, on the one hand, are morbid or fastidious, or peculiarly susceptible to the thing complained of, or, on the other hand, are unusually insensible thereto. *21 Am. & Eng. Encycl. L. (2d ed.) 689.*

There is no evidence before the court on this hearing to the effect that the complainants and affiants are morbidly sensitive as to the sounds that form the gravamen of the complaint, except that it may be inferred that such is the fact because of the overwhelming proof of those residing in the same neighborhood that the noises spoken of by the complainants are quite inappreciable and not at all disturbing. This feature of the case may perhaps be gone into on final hearing. The question, as I understand it, does not turn upon the preponderance of the evidence as to the extent and character of the noises so much as it does upon the question whether the affidavits on behalf of the defendants show the affiants on behalf of the complainants to be untruthful as to the existence of the noises. Because innumerable witnesses living in the vicinity of the ball grounds say that they are not annoyed, either by persons passing their houses to and from the park or by the demonstrations of those in the park and upon the stands, that does not necessarily show that others, comparatively few though they be, may not be annoyed and suffer great inconvenience, amounting to a nuisance, from the facts to which I have just adverted. It is notorious that many people living near railroads and factories become so accustomed to the noises emanating therefrom as not to notice them, while, on the contrary, some people, similarly situated, can never be oblivious to them.

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The law governing the matter under consideration is to be found in the three cases in this court of *Cronin v. Bloemecke*, 58 N. J. Eq. (13 Dick.) 313, decided by Vice-Chancellor Emery in 1899; *Gilbough v. West Side Amusement Co.*, 64 N. J. Eq. (19 Dick.) 27, decided by Vice-Chancellor Pitney in 1902, and *Seastream v. New Jersey Exhibition Co.*, 67 N. J. Eq. (1 Robb.) 178, decided by Vice-Chancellor Pitney in 1904.

The decision in the *Seastream Case* went upon the ground that some five or six of the complainants who resided in the neighborhood of the park were disturbed by the noise of the shouts and applause from the grounds on Sundays when ball games were played, and that several others of the complainants suffered from the noise and unruly conduct of the great crowds alighting from and boarding trolley cars in front of their residences and in going to and from the park and the trolley. 67 N. J. Eq. (1 Robb.) 181. In the case before me seven affiants swear to a state of facts tending to show that a nuisance is created by the holding forth of the ball games at the Inlet Park, Atlantic City, on Sundays, two of them, the Rev. Mr. McMillan and Mrs. Reynolds, speaking only to the question of noise and unruly conduct by the crowds going to and returning from the games, while the other five testify to a nuisance created upon and about the park at the playing of the games.

The question whether those suffering from one or the other of two kinds of annoyance, namely, that on the highways leading to and from the baseball grounds, and that emanating from the grounds while games are in progress, may join in the same bill of complaint, was raised in the *Seastream Case*, but was left undecided, as no demurrer was filed and the defendant had not been embarrassed in presenting its defence. 67 N. J. Eq. (1 Robb.) 187. The question of misjoinder was not even raised upon the argument of this cause, and will, therefore, not be considered.

A parallel to be found in the *Seastream Case* is, that the defence was there made that the ball ground was not the only place to which people resorted who went by the premises of the complainants and annoyed them. It was shown that Newark bay was only a slight distance from the ball grounds and that

people were attracted to its shores for amusements on Sundays, consisting of boating, crabbing, fishing and picknicking, and that independent of the baseball playing a large crowd on Sundays habitually resorted to the neighborhood by means of the trolley, alighting at the very same part of the avenue and creating precisely the same nuisance as was complained of on account of the baseball crowds. 67 N. J. Eq. (1 Robb.) 185. Vice-Chancellor Pitney did not think that that state of affairs estopped the complainants from asserting their rights against the defendants.

The case of *Gilbough* was also a Sunday baseball case. The fact of the nuisance was disputed. In that case (*Gilbough*) affidavits produced by the defendant made by persons who lived near the grounds were to the effect that the noise, although heard by them, did not annoy them. 64 N. J. Eq. (19 Dick.) 35. In the case now being considered some of the numerous witnesses for the defendants said that they heard noises, but that they were slight and not disturbing, and others of them said they heard no noises at all. In the *Gilbough Case* Vice-Chancellor Pitney said that the noises, if loud enough to appreciably disturb complainants' rest, constituted a nuisance against which they were entitled to relief in this court. 64 N. J. Eq. (19 Dick.) 30.

In the *Cronin Case*, which was a case of disorderly baseball games played on weekdays and on Sundays, Vice-Chancellor Emery says that the protection of one's dwelling-house against nuisances which render it uncomfortable is a right which has been constantly protected in this court by preliminary injunction, even when the existence of the nuisance is disputed. 58 N. J. Eq. (13 Dick.) 317.

In the unreported case of *Rausch v. Glazer* (May term, 1908), which was a nuisance case heard before me, and in which the question was as to stenches emanating from a rendering establishment, I took occasion to observe that the nuisance being established by satisfactory testimony, the evidence was not overcome by testimony of a negative kind; that testimony of some of the neighbors that they were not annoyed did not disprove that the complainant and his family were annoyed.

Another phase of the case under consideration was dealt with by Vice-Chancellor Pitney in the *Gilbough Case*. He said that

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noises which would not be declared to be nuisances on a weekday are held to be nuisances if made on a Sunday, because they have the effect of disturbing that quiet and rest which the citizen, wearied with six days of labor, is entitled to have for his recuperation, and that the fact that such noise is forbidden by the laws of the land (the Sunday laws) takes away from the producer any excuse therefor (64 N. J. Eq. (19 Dick.) 29, 30), that is, as I understand it, takes away his defence so far as that defence may be any justification for the making of disturbing noises at the given time, even though they be but slight.

In the earlier cases of Cronin and Gilbough the court dealt with the character of the injunction that should go for the relief of the complainants. In the *Cronin Case* the restraint went against the use of the park for the purpose of baseball games so that a nuisance might be occasioned to the annoyance and injury of the complainant and his family at his residence, the games not being prohibited entirely (58 N. J. Eq. (13 Dick.) 316, 317), and in the *Gilbough Case* the injunction went restraining the defendant from permitting any noise or noises to be made upon its premises on Sunday which should disturb the complainants or their families, there being no prohibition of the games themselves (64 N. J. Eq. (19 Dick.) 36), but, in the *Seastream Case*, the law having previously been so well settled, the injunction went restraining the playing of baseball on Sundays altogether. 67 N. J. Eq. (1 Robb.) 187.

Now, applying the law, as I understand it, to the facts of this case, as I understand them, I am constrained, following the last and culminating decision, to advise the issuance of an injunction against the playing of baseball games on Sundays at the Inlet Park, Atlantic City, until the final hearing of this cause, and until the further order of the court to the contrary.

It may not be amiss to state again that an injunction does not issue in a cause like this upon any theory of enforcing observance of the Sunday laws. It goes only to protect the citizen against a nuisance which appreciably affects him. If the question before me had not already been passed upon by this court I should feel inclined to do no more than advise an injunction restraining the defendants from holding forth baseball games in such way or

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manner as to disturb and annoy the complainants at their residence, but, as already remarked, I feel bound to follow the *Sea-stream Case*, which appears to be a good deal like this one, and to grant an injunction restraining the games altogether. If this decision be erroneous there is a court above me to which the defendants may resort for correction of the error.

The order to show cause will be made absolute, with costs to abide the event of the suit.

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THE MAYOR AND COMMON COUNCIL OF THE CITY OF SALEM

v.

BOARD OF HEALTH OF THE STATE OF NEW JERSEY.

[Decided October 4th, 1909.]

1. When jurisdiction is conferred by statute upon this court without provision made for the kind of pleading by which the power of the court is to be invoked, a bill of complaint is the proper method of procedure.

2. A person or corporation aggrieved by a finding of the state board of health concerning water pollution under section 1 of the supplement to the State Sewerage Commission act of May 7th, 1907 (*P. L. 1907 p. 360*), may "appeal" to this court by bill of complaint according to the established practice of the court.

3. If a defendant submits to answer he must answer fully, and an answer that the defendant denies all of the matters set forth in a certain paragraph of the complainant's bill is insufficient. Each material allegation of fact charged must be answered not only as to the defendant's knowledge of each fact, but, if he has no knowledge, then as to his information and belief regarding it, if he has any.

4. An application to withdraw an answer represented to have been improperly and inadvertently filed, will be denied unless it be shown that the answer was filed through mistake or under a misapprehension of the defendant's rights.

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On exceptions to answer, and on motion to withdraw answer and dismiss bill.

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*Mr. Henry Burt Ware and Mr. Thomas G. Hilliard, for the complainant.*

*Mr. Nelson B. Gaskill, assistant attorney-general, for the defendant.*

WALKER, V. C.

After the coming in of an answer to the bill of complaint in this cause exceptions to the answer were filed; whereupon the defendant gave notice of an application to withdraw the answer and dismiss the bill. An examination of the pleadings therefore becomes necessary.

The answer admits the allegations in the bill to and including those in its fifth paragraph. The sixth paragraph of the bill avers that the waters of Salem and Fenwick creeks and the Delaware river from the city of Camden and south thereof for a distance of over forty miles up the river from the mouth of Salem creek are of a saline character and are not potable waters; that the city of Salem is so situate that there are no habitations upon Salem and Fenwick creeks and the Delaware river near the city of Salem, and that an excess of twenty miles of Delaware bay lies between the mouth of Salem creek and the nearest oyster beds dredged for obtaining oysters. The third paragraph of the answer avers that the defendant denies any and all of the matters set forth in the sixth paragraph of the bill.

The first exception is that the defendant has not, according to the best of its knowledge, remembrance, information and belief, set forth in the fifth paragraph of its answer a separate and detailed answer to the allegations contained in the sixth paragraph of the bill, but that the answer is evasive and not directly responsive, and does not separately and specifically deny, but merely makes a conjunctive denial of the averments concerning the saline character of the waters of the creeks and the distance on the bay, &c.

The second exception is that the defendant has not in any manner answered and set forth in the sixth paragraph of the answer whether or not the city of Chester, Pennsylvania, and the cities of Wilmington, New Castle and Delaware City, Delaware, and

many other cities and towns as well as the borough of Pennsgrove, in this state, now discharge their entire sewage into the Delaware river at points nearer to the source and head thereof than the mouth of Salem creek, and that the amount of sewage discharged in the Delaware river by the cities and towns in the States of Pennsylvania and Delaware is many times in excess of the small amount of sewage discharged into Salem creek by the complainant.

The third exception is that the defendant has not answered, set forth and discovered the evidence and proofs on which its action or resolution adopted January 19th, 1909, relative to the disposition of the sewage of Salem, was based or taken. In this connection it should be remarked that there is no prayer for discovery in the bill of complaint.

The fourth exception is that the defendant has not answered and set forth any proofs, evidence or reason showing that the discharge of its sewage by complainant into the Salem creek is a pollution of the waters of this state in such manner as to cause or threaten injury to any of the inhabitants of this state either in health, comfort or property.

The fifth exception is that the defendant has not answered and set forth whether or not the proposed or other disposition by the complainant as directed by the notice served on it by the defendant, of its sewage and other polluting matter, will entirely destroy any benefit to the complainant of its present sewerage system, and that the injury to the complainant thereby would be irreparable, and would remove from the complainant all the value of its present sewerage system.

The sixth exception is that because the complainant appeals from the order or resolution of the defendant to this court, according to the statute in such case made and provided, the defendant has not answered and shown and set forth all actions and proceedings had and taken by it together with its proofs and other evidence under and on which it caused the notice to be served on the complainant as set forth in said bill.

It should be remarked that the complainant alleges that the statute under which the defendant has acted in this matter does not accord with the provisions of the constitution and conflicts

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therewith, and is therefore void and of no effect, being in violation of the fourth and eleventh clauses or paragraphs of section 7, article 4, of the constitution.

The defendant presses an application to withdraw the answer and dismiss the bill—*first*, because the method of review of the order of the board of health of the State of New Jersey is by *appeal* to this court, pursuant to the provisions of section 1, chapter 135, of the laws of 1907, and not by bill of complaint; *second*, because if the act of the legislature approved May 7th, 1907, the title of which is recited in the complainant's bill, is not in accordance with the provisions of the constitution of this state, but in conflict therewith, then the remedy of the complainant is not in equity, but by *certiorari*, as the board of health, if the act be unconstitutional, would not have jurisdiction to make the order of which complaint is made; *third*, because if the Sewerage act of 1900, and the acts amendatory thereof and supplementary thereto, are special legislation and in violation of the fourth and eleventh paragraphs of section 7, article 4, of the constitution, then the remedy of the complainant is not in equity but by *certiorari*, for the reason last mentioned; *fourth*, because the answer of the defendant was improperly and inadvertently filed and should be withdrawn until disposition is made of the matters set forth in the first, second and third reasons above stated.

The action of the state board of health, which has precipitated the controversy in this suit, arises out of the service of a notice of which the following is a copy:

"BOARD OF HEALTH OF THE STATE OF NEW JERSEY.

"Pursuant to Chapter 72 of the laws of 1900, and the supplements and amendments thereto, notice is hereby given by the Board of Health of the State of New Jersey to His Honor the Mayor of Salem. for the City of Salem. New Jersey, that prior to the first day of September, nineteen hundred and thirteen, the City of Salem must cease to pollute the waters of the Delaware river and its tributaries and make such other disposition of its sewage or other polluting matter as shall be approved by the Board of Health of the State of New Jersey.

"L. S. By order of the Board of Health of the State of New Jersey in pursuance of a resolution adopted the nineteenth day of January, 1909.

"BRUCE S. KEATOR,  
"Secretary."

"JOHN H. CAPSTICK,  
President



This notice was given under the authority of section 1 of the supplement of May 7th, 1907 (*P. L. 1907 p. 360*), to the State Sewerage Commission act. It provides that the state sewerage commission is authorized and empowered to inspect any of the waters of this state, and if it finds that any of them are being polluted in such manner as to cause or threaten injury to any of the inhabitants of the state, either in health, comfort or property, it shall be its duty to notify, in writing, any person, municipality or private corporation found to be polluting said waters, that prior to a time to be fixed by the commission, said person or corporation must cease to pollute said waters and make such other disposition of the sewage or other polluting matter as shall be approved by said commission. The section then proceeds to provide that any person or corporation aggrieved by any such finding may appeal therefrom to the court of chancery at any time within three months after being notified thereof, the court being empowered to hear and determine the appeal in a summary manner, according to its course and practice in other cases, and thereupon to affirm, reverse or modify the finding of said commission in such manner as it may deem just and reasonable. The state sewerage commission was superseded by act of April 16th, 1908 (*P. L. 1908 p. 605*), and all its powers and duties were vested in the board of health of the State of New Jersey, the defendant. Hence the above notice emanated from that authority.

A fundamental condition prerequisite to giving to a person or corporation notice to cease polluting any of the waters of this state is a finding that such waters are being polluted in such manner as to cause or threaten injury to any of the inhabitants of this state, either in health, comfort or property. Upon such a finding it is made the duty of the board of health to give the notice. It does not appear by the notice given in this case that any finding was first made by the board of health to the effect that the city of Salem was polluting the waters of the Delaware river and its tributaries, and, consequently, so far as the notice on its face is concerned, no valid demand appears to be made upon Salem to make "such other" (not before having said what) disposition of its sewage or other polluting matter as shall be

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approved of by the state board of health. However, the complainant does not make the point that the notice is defective in form or substance, but, assuming that it requires the city of Salem to cease sewerage into Salem creek, it proceeds to aver that such discharge of its sewage is not, and cannot be, a pollution of the waters of this state, because those waters at and about the place in question are saline and not potable, and because certain cities of Pennsylvania and Delaware, besides the borough of Pennsgrove, in this state, are discharging sewage into the Delaware river at points above the mouth of Salem creek, and that the amounts discharged by those cities are many times in excess of the small amount discharged into Salem creek by the complainant, the inference being, I presume, that the pollution, if any, from Salem is inappreciable and indeterminate. It is to be observed that under the act of the legislature in question the potability of waters is not made the test, so that the pollution can be as well of salt as of fresh water, and yet it would seem that the character of the water, whether potable or not, is material on the question of injury to health at least.

Were it not for the saving clause in the supplement of 1907 giving to any person or corporation aggrieved an appeal to this court from the finding of the sewerage commission (now state board of health), the question whether the discharge of sewage by such person or corporation into any of the waters of this state, polluted such waters or not would be an immaterial inquiry, for, in such case, the judgment of the sewerage commission would be all sufficient, in my opinion, under the authority of *State Board of Health v. Diamond Mills Paper Co.*, 63 N. J. Eq. (18 Dick.) 111. In that case Vice-Chancellor Stevens based his judgment largely upon the reasoning of Sir George Jessel, master of the rolls, in *Attorney-General v. Cockermouth Local Board*, L. R. 18 Eq. Cas. 172, in which that judge remarked: "This is an information by the attorney-general against a public body to enforce the terms of a public act of parliament. Now, if I understand the law upon this subject, it is not necessary for the attorney-general to show any injury at all. The legislature is of the opinion that certain acts will produce injury and that is enough."

Vice-Chancellor Stevens, in *State Board v. Diamond Mills*, was dealing with another act of the legislature, the potable water act. That act made the deposit of deleterious matter which would corrupt or impair, or tend to corrupt or impair, the qualities of the waters of any river, &c., unlawful, and it was held that it could not be shown in defence that the waters at a given point were not polluted by such matter.

The provisions in that regard of the act now under consideration are quite different, for in that act it is provided that if any of the waters of this state are being polluted in such manner as to cause or threaten injury to any of the inhabitants the sewerage commission shall act, and from that action an appeal shall lie to this court, which may affirm, reverse or modify the finding of the commission in such way as may be deemed just and reasonable. This can mean nothing else than that the court shall review the judgment of the commission.

Now, the city of Salem, the municipal corporation which received the notice complained of, appeals to this court from the action of the state board of health. The form in which the appeal is couched will be considered later.

By its bill, in which it says it "hereby appeals from said order or resolution (of the state board) to this honorable court, according to the statute in such case made and provided," it sets forth and avers that the discharge of its sewage into Salem creek is not, and cannot be, a pollution of the waters of this state in such manner as to cause or threaten injury to any of its inhabitants, either in health, comfort or property. Thus a question of fact, within the terms and words of the statute, is raised by the appeal.

The law upon the subject of the exceptions to the answer will be found in the opinion of Vice-Chancellor Stevens, in *Thompson v. North*, 67 N. J. Eq. (1 Robb.) 278.

The first exception must be sustained. The defendant must answer fully. A general denial will not suffice.

The second exception must be overruled. It avers that the defendant has not set forth in paragraph 6 of the answer whether or not certain municipalities now discharge their entire sewage into the Delaware river at points nearer its source than the

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mouth of Salem creek, &c. Paragraph 6 of the answer goes to paragraph 8 of the bill, which makes no allegations concerning the matters pointed out in the exception. An exception must accurately point out the objectionable matter. *Dick. Ch. Pr.* (2d ed.) 121 note b, and cases cited.

The third exception is overruled. It is that the defendant has not, in its answer, set forth and discovered the evidence and proofs on which its determination relative to the disposition of Salem's sewage was based. A defendant, as I understand it, cannot be called upon to set forth and discover his evidence, but only facts concerning which evidence may be given.

The fourth exception must be overruled for the reason last stated.

The fifth exception must be overruled. It is that the defendant has not answered and set forth whether or not disposition by the complainant of sewage as directed in the notice will entirely destroy the benefit and value of the complainant's present sewerage system. Whether or not the proposed action by the state board of health will result as suggested is an immaterial and irrelevant fact, and the defendant is not called upon to answer any but relevant and material facts.

The sixth exception is overruled for the same reason given for overruling the third exception.

The defendant's application to withdraw the answer will be overruled. If a defendant alleges that an answer was filed improvidently, and through mistake, and under a misapprehension of his rights, the court may grant leave to withdraw the answer upon terms. *Williams v. Carle*, 10 N. J. Eq. (2 Stock.) 543, 546. It was represented that the answer under consideration was improperly and inadvertently filed, but it was not shown that it was filed by mistake or under a misapprehension of the defendant's rights. The parties must go to hearing on the pleadings as they stand, save that the defendant will be obliged to answer over in respect to the exception sustained.

Nevertheless, in disposing of the matter, I desire to make an expression upon the method adopted by the complainant to bring before the court for review the action of the defendant. In other words to express an opinion upon the proper form of an

appeal in such a case as this. As already remarked, the act of the legislature, under which the defendant is proceeding, makes provision that an appeal shall lie to this court, and the defendant insists that the complainant's remedy is by "appeal" and not by bill. The form in which the appeal may be couched is neither provided by statute nor rule of court.

A suit in equity is ordinarily commenced by filing a petition, which, when preferred by a citizen, is called a bill, and when by the attorney-general to vindicate a public right, is called an information. Many statutes point out the particular mode by which relief thereunder is to be sought from the court, and when so pointed out that method must be followed. *Dan. Ch. Pl. & Pr. 1 et seq.* The numerous instances in which the legislature of this state has made provision that suits in this court may be commenced by petition, such as in divorce, insolvent corporations, sale of land, &c., indicate that in the absence of such statutory regulation the proper mode of commencing those proceedings is by bill. But the defendant's insistment is not that this appeal should be taken by petition instead of bill, but simply by "appeal," whatever that may exactly mean. How could an answer to the "appeal" be compelled? It can be compelled by *subpœna ad respondendum* issued on a bill filed, and I hold that an appeal in the form of an original bill is appropriate in these cases.

The defendant seeks to compel the complainant to cease sewer-ing into Salem creek and to make such other disposition of its sewage as shall be approved by the state board of health prior to September 1st, 1913, and the complainant in its bill prays that the order or resolution of the defendant may be reversed, set aside and for nothing holden, and that the defendant may be enjoined and restrained from carrying into effect the provisions of its resolution and from interfering with or in any way molesting the complainant in the enjoyment of its present sewerage system. If the determination of this suit should result in a reversal of the state board's finding and resolution, that of itself would doubtless prevent further action on its part under its resolution and notice, but the issuance of an injunction would not be inappropriate, and it may be that jurisdiction by appeal

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in these cases was given to this court because of the appropriateness of its remedial process. See *State Board of Health v. Diamond Mills Paper Co.*, *ubi supra* (at p. 115).

The other reasons urged in the notice of application to withdraw the answer, namely, that if the act under which the proceedings of the state board of health were taken is unconstitutional, the complainant's remedy is by *certiorari*, and not by bill in equity, will be considered on the hearing of the cause, for a motion to dismiss the bill because the remedy is at law may be granted on final hearing, even though no demurrer be filed. *Hoagland v. Supreme Council*, 70 N. J. Eq. (4 Robb.) 607, 610. And the court may, of its own motion, dismiss the bill upon the ground that the complainant has an adequate remedy at law. *Varrick v. Hitt*, 66 N. J. Eq. (21 Dick.) 442.



CASES ADJUDGED  
IN THE  
COURT OF ERRORS AND APPEALS  
OF THE  
STATE OF NEW JERSEY  
ON APPEAL FROM THE COURT OF CHANCERY,  
AND THE PREROGATIVE COURT.

JUNE TERM, 1909.

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ELIAS BERLA, complainant-appellant,

v.

FLORENCE RICE STRAUSS et al., defendants-respondents.

[Argued June 18th, 1909. Decided November 15th, 1909.]

In a suit to have a resulting trust declared in land received by defendant by devise, on the ground that part of the purchase-price was furnished by complainant and title taken in testator, the rights of the parties will not be determined on the theory that the land was originally owned by complainant and testator as tenants in common, and, as testator acquired title through purchase on a foreclosure sale, complainant could treat the purchase as a redemption and have his rights as a co-tenant established, where the proofs were not taken on that theory.

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On appeal from a decree of the court of chancery advised by Vice-Chancellor Howell, whose opinion is reported in 74 *N. J. Eq.* (4 *Buch.*) 678.



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Berla v. Strauss.76 Eq.

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*Mr. Chauncey G. Parker*, for the appellant.

*Mr. Louis Hood*, for the respondents.

The opinion of the court was delivered by

GUMMERE, CHIEF-JUSTICE.

The complainant, by his bill in this case, seeks to have a resulting trust decreed in his favor in a tract of land held by the defendants under a devise from one Bernard Strauss, deceased. The ground upon which he bases his right to such relief is that Strauss, in his lifetime, purchased the tract of land in question with moneys which were, to some extent, furnished by the complainant, and took title in his own name for the joint benefit of the complainant and himself, by virtue of an understanding to that effect existing between them.

The learned vice-chancellor, before whom the hearing was had, reached the conclusion that the proofs in the case did not support the allegations in the bill, and advised a decree of dismissal. We think he was right in the conclusion which he reached, and that the decree should be affirmed.

Upon the argument had before us it was suggested to counsel, by a member of the court, that even if the complainant was not entitled to the relief sought by his bill, nevertheless, that, as the proofs in the case showed that the land in question had originally been owned by the complainant, Strauss and one Smith, as tenants in common, and that the title which Strauss acquired came to him through a purchase made by him at a foreclosure sale in a suit brought against these tenants in common, the complainant might be entitled to treat the purchase by Strauss as a redemption of the mortgage debt, although he contributed nothing to the purchase-money, and to have a decree establishing his rights as such tenant in common, upon reimbursing the defendant for his proportionate share of the purchase-money advanced by Strauss. Following this suggestion briefs were asked of counsel upon this point by the court, and they were submitted. A careful examination of the proofs in the case, however, satisfies us that they were not taken with the view of sup-

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porting or defeating the suggested right of the complainant, and that injustice might easily be done to the one side or the other by attempting to settle that right upon the proofs submitted. For this reason we decline to pass upon the matter in this litigation, leaving it to the complainant to present it in an independent suit, if he deems it advisable to do so.

*For affirmance*—THE CHIEF-JUSTICE, GARRISON, SWAYZE, REED, TRENCHARD, PARKER, BERGEN, VOORHEES, MINTURN, BOGERT, VREDENBURGH, VROOM, DILL, CONGDON—14.

*For reversal*—None.

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JOSEPH STEIN, appellant,

v.

CHARLES H. CUFF, respondent.

[Submitted July 3d, 1909. Decided November 15th, 1909.]

1. As a general rule equity will entertain a bill to restrain the enforcement of a judgment for a new trial in an action at law only when the grounds on which the new trial is sought are not cognizable by the court in which the judgment was recovered.

2. A party in an action at law, who applies therein for a new trial on grounds cognizable by a court at law, and who is defeated, cannot afterward be heard on the same matter in a court of equity.

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On appeal from an order of the court of chancery advised by Vice-Chancellor Leaming.

*Mr. Ulysses G. Styron*, for the appellant.

*Mr. George A. Bourgeois*, for the respondent.

The opinion of the court was delivered by

GUMMERE, CHIEF-JUSTICE.

The complainant seeks by his bill to restrain the enforcement of a judgment recovered against him in an action at law brought in the Atlantic circuit court, and to compel a new trial of that action. He rests his right to this relief upon the following facts: Shortly before the day fixed for the trial of the case by the circuit court, one R., the attorney whom the complainant had employed to defend the suit, refused to attend at the trial, or to surrender to the complainant certain papers which the latter had deposited with him, and which would have conclusively established the defence set up in the action, unless the complainant would satisfy an exorbitant demand for money made upon him by R. The complainant refused to comply with this demand, employed another attorney, and went to trial on the day fixed. R. absented himself from the court, and retained possession of the papers which complainant had deposited with him. For want of R.'s presence as a witness, and for want of these papers, the defence failed, and a verdict went against the complainant.

Upon the presentation of the bill to the chancellor an order to show cause why a preliminary injunction should not issue in accordance with its prayer was allowed. Upon the hearing of that order it was disclosed by affidavits submitted on behalf of the defendant that, at the time of the trial, the complainant's substituted attorney was aware of the importance of R. as a witness and of the value of the papers in his possession as proof supporting the defence; that notwithstanding this knowledge no attempt was made on behalf of the complainant either to compel the appearance of R. or the production of the papers at the trial. It further appeared by these affidavits that in due time after the rendition of the verdict, application for a new trial was made by the complainant to the court in which the action was brought; that the grounds upon which the application was rested were the same as those upon which relief is sought by the present proceedings; and that, after consideration, the application was denied by the trial court.

The conclusion reached by the court of chancery was that, on the facts set out in the bill of complaint, and the defendant's answering affidavits, a preliminary injunction ought not to issue; and it was so ordered. From this order the complainant appeals.

Although the hearing of applications for new trials in actions at law is a part of the ancient jurisdiction of a court of equity, yet, even in the days before courts of law had extended their jurisdiction over that subject, chancery exercised this power sparingly. *Smith v. Lowry*, 1 Johns. Ch. 320. Since courts of law have assumed jurisdiction over applications for new trials in causes instituted before them, equity has gradually withdrawn from that field of jurisprudence, so that in the present day it may be said, as a general rule, that it will only interfere in that direction when adequate relief cannot be afforded by the court in which the judgment has been obtained; or, to state it differently, when the grounds upon which the new trial is sought are not cognizable by the legal tribunal. *Hannon v. Maxwell*, 31 N. J. Eq. (4 Stew.) 318, 329. Upon this ground, therefore, the refusal of the court of chancery to direct an injunction was entirely proper.

The refusal is to be justified also upon a broader ground. Assuming that the exercise of jurisdiction by the court of chancery in applications for new trials is a matter of discretion in that court, nevertheless the jurisdiction over that subject is concurrent with that of the law courts, and a litigant may select either tribunal as the forum in which to have such an application considered and determined. If he selects the law court he cannot afterwards be heard upon the same matter in a court of equity, for such a proceeding would be, in its essence, a review of the determination of the legal tribunal, and such power of review does not reside in the court of chancery. The principle that the decision of a court of competent authority is binding and conclusive upon all other courts of concurrent power is of universal application; and for this reason, as was said by Chancellor Kent in *Simpson v. Hart*, 1 Johns. Ch. 91, 97, in discussing the question which we are now considering: "Where courts of law and equity have concurrent jurisdiction over a question, and it receives a decision at law, equity can no more re-examine it than

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courts of law in a similar case can re-examine a decree in a court of chancery."

The order appealed from will be affirmed.

*For affirmance*—THE CHIEF-JUSTICE, GARRISON, SWAYZE, REED, TRENCHARD, PARKER, BERGEN, VOORHEES, MINTURN, BOGERT, VREDENBURGH, VROOM, GRAY, DILL, CONGDON—15.

*For reversal*—None.

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FRANK LAKE et al., respondents,

v.

JOSEPHINE T. WEAVER et al., appellants.

[Argued June 22d, 1909. Decided November 15th, 1909.]

1. When a deed of conveyance duly delivered by the grantor has remained for a long period of years in the possession of the grantee, its acceptance, nothing appearing to the contrary, will be inferred; and a like inference arises where the deed was for the benefit of the grantee.

2. The title to land, if once vested in a grantee by the acceptance of a valid deed of conveyance, cannot, in legal contemplation, be revested by the grantee in the grantor or his heirs save by an appropriate documentary act; in the absence of such an act the fact that the deed was not recorded or that it was lost is ineffectual either to divest the legal estate or to re-vest it in those who appear as owners of record.

3. Admissions or declarations of the holder of the legal title to land that have not induced any action or inaction in other claimants or worked any change in their status do not constitute an estoppel.

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On appeal from the decree of the court of chancery advised by Vice-Chancellor Garrison, who filed the following opinion:

In an opinion filed on the 15th day of May, 1908, I formulated the issues and announced my conclusions in this cause.

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This cause has been before the court for a long time, the first testimony therein having been taken at Trenton on the 11th day of December, 1906.

Among the matters offered in evidence at a hearing held January 28th, 1908, was the deposition of one George A. Bourgeois, taken on the 11th of January, 1908. This deposition was taken at the instance of the complainants. Among the objections made on behalf of the defendant to the admission of this deposition was that it appeared that Mr. Bourgeois was, at the time of the communications and transactions alluded to in his testimony, the solicitor and counsel of Mrs. Josephine T. Weaver, and that, by the familiar rule which protects the communications of clients, her communications to him were privileged and protected. The court thereupon considered all of the evidence which had been taken at that hearing upon the matter, and not finding any in which Mrs. Weaver had waived her privilege, ruled that the deposition was not admissible. Therefore at the time the court decided the case there was no testimony, excepting that given by Mrs. Weaver upon the witness-stand, as to the transactions between her and her son Theodore at the time that she received the deed in question, which deed having been lost, the defendants took the proceedings to have it established under the statute which are sought to be enjoined in this suit by this bill.

The complainant, after the filing of my opinion of May 15th, 1908, petitioned the court for a rehearing, which was granted and has now been held. At that rehearing it developed that the testimony taken at Trenton on December 11th, 1906 (overlooked by all of the parties and by the court at the time that the admissibility of the Bourgeois deposition was being discussed), contained many references by Josephine T. Weaver to the matter in hand. It is shown in that testimony that Mrs. Weaver, upon being interrogated by her own counsel as to why she had admitted in the specific performance suit brought against her by the Whites that one-third of the property was owned by the children, answered that it was because of advice given to her by Mr. Bourgeois, and she assumed to recite the language that he used to her in giving her that advice, saying that he told her that if the deed was lost, as she said it was, her rights were all lost—

that she had no rights—that they were lost, and that, acting under that advice, she admitted that the children had a third interest.

The Bourgeois deposition dealing with this matter of the failure to set up the rights of Mrs. Weaver under the deed of her son to her in the specific performance case, states that the reason was that she told him, Bourgeois, that this deed, which she exhibited to him, was given to her by her son for no consideration whatever, that she had given nothing for it; that she held it for the children of her son Theodore, and had no other interest in it, and that, under the circumstances, he advised her that there was no necessity for her to set it up in the specific performance case.

Since the entire case, as dealt with by me heretofore, rested upon the testimony of Mrs. Weaver, and since the testimony of Mr. Bourgeois, an impartial and credible witness, shows that her testimony is false, I propose to reverse my finding of fact.

I now find that Mrs. Weaver received this deed under circumstances which made it optional with her (as I heretofore held in the partition suit, *White v. Smith*, 72 N. J. Eq. (2 Buch.) 697), whether she would take it or not, and I find that she did elect, as shown by the Bourgeois testimony, not to take it, and that by her actions and conduct she did, in every way that was possible except by actually drawing a deed from herself to the children and putting that on record, vest the title in the children. In other words, the title descended to the children on the record. If she withheld the deed from record, the record would vest the title in them. She did withhold the deed from record; she stated that; she practically shows that whatever her rights were, she was making a gift to the children, or, at least, not claiming any rights herself, which resulted in a gift to the children, or resulted in the children getting the title, and I now find the very state of mind exhibited by her own conduct which, without the Bourgeois testimony, I failed to find in that suit.

I will advise a decree that the defendant Josephine T. Weaver be enjoined from proceeding to have this deed established of record under the statute, and that Josephine T. Weaver has no interest in the one-third of the proceeds realized in the partition

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suit, which therein nominally go to the complainants in this suit, and that the complainants in this suit may apply therein for their rights, upon notice to the defendants.

The foregoing was the oral statement of the court in deciding the case at the conclusion of the rehearing.

Having been notified of the taking of an appeal, I think it proper to add a brief statement for the purpose of making the grounds of my decision more easily understood.

I do not think it necessary to restate the facts, in view of the two previous statements reported in *White v. Smith, supra*, and in the unreported case of *Lake v. Weaver*. I desire to add, however, the impression which I think is apparent in my previous dealings with this evidence, which I obtained from Mrs. Weaver's manner, and, to some extent, from her own testimony, and that was that she was not willingly asserting any claim under the deed from her son to herself, but was, so to speak, permitting herself to be used to establish a legal position outside of and unconnected with her own volition. Her conduct with respect to the deed itself was in accordance with this attitude. She did not record it, and no longer had it in her possession, and my impression always was that she had voluntarily destroyed it. Even before the admission of the Bourgeois deposition I could not escape the conviction that Mrs. Weaver, from the date of the deed in 1889 to 1905, when the application to establish the lost deed was made, a period of sixteen years, did not intend to take any personal advantage of the deed. But in the absence of any clear legal proof that this conduct was the result of an executed purpose to thereby make a gift to the children of her son (the grantor in the deed), I decided that her legal rights prevailed. And I do not now decide that such legal rights fail because she must be considered a trustee. I am aware of and give full weight to the decisions in our state to the contrary. I do not intend by this decision to abate at all from the rule established in this state that a conveyance upon an expressed consideration with the uses declared in favor of the grantee is protected under the statute of frauds from attack by oral proof on the part of the grantor. This rule I consider to be too well settled to require citation.

If, however, the alleged trust in this case is to receive any con-



sideration, and the decision be not put upon the ground upon which I put it, the complainants could prevail without infringing upon the rule just stated. There is nothing to prevent one who is a trustee under an oral trust unprovable under the statute of frauds from voluntarily executing such a trust, and after such execution the court will not interfere. *15 Am. & Eng. Encycl. L. (2d ed.) 1169, note 5.*

Giving to the Bourgeois deposition the controlling weight to which, by reason of the character of the witness and his absolute impartiality, it is entitled, it establishes that Mrs. Weaver informed him she had no interest in this property, was a dry trustee, and was thereupon advised by him that, under the circumstances, the deed which she exhibited to him was of no consequence or moment.

In the very suit then in hand she asserted the ownership by the children of her son, the grantor in the deed, of the very lands described in the deed and at or about that time the deed finally disappears—destroyed, as I have before stated, I believe, by her.

The proper finding upon this state of facts would be that she had executed the trust. If she recorded the deed and the legal title was vested in her she was a dry trustee. If she desired, then, to execute the trust, which was not enforceable against her because of the absence of a writing, she would have to execute a deed or declaration of trust to the children aforesaid. But her purpose to execute the trust and vest the title in the children would be just as effectually accomplished, without any expense or trouble, by merely destroying the paper evidencing the legal title in herself.

It was an immaterial detail, therefore, excepting only the matter of expense whether she recorded this deed and made one back to the children, or whether she destroyed the deed and thereby just as effectually caused the title to be in the children. The children, by the operation of law, held the title to this property unless the deed from their father to Mrs. Weaver was effective.

Her conduct, therefore, at that time was an effective execution of the trust, and the fact that the same was not enforceable against her is now negligible.

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But, as before stated, I think exactly the same finding will result by considering her in the position of a donor whose gift was completely executed, and will not now be undone.

While only her own testimony was usable to discover the facts, I was constrained, unwillingly, as appears by my statement at the time, to find that she might hold this otherwise voluntary deed as a mortgage. I could not even then escape the conviction that from the time she obtained the deed as aforesaid, and for the sixteen years which followed, her intention had always been to take no advantage under the deed, and to give the benefit of the property to the children of her son. But I had not, up to the time of the admission of the testimony of Bourgeois, any sufficient proof upon which to rest my conviction of what the situation really was. That evidence, in my view, clears up the whole case. It shows that Mrs. Weaver never intended to claim anything under the deed given her by her son; that, therefore, she refrained from recording it; that when every legal and moral necessity called upon her to honestly state the facts and her intention or claim (namely, in the specific performance case of the Whites against her), she not only negatived her own claim by not setting it up, but affirmatively set up that the right, title and interest were in the children of her son. At that time, with full knowledge of the facts, with the necessity for her to declare her intention, with the deed in her possession, and able counsel at her elbow, she disclosed, in my view, her intention and determination, which was to refrain from claiming anything personally beneficial to herself by reason of the deed, and to thereby give to the children of her son the property in question. Immediately thereafter the deed disappeared.

I think it entirely clear that she must be held to have effectually given (in consonance, as I believe, of her original intention never to take) the property in question.

The decree will be along the lines above indicated.

*Mr. Gilbert Collins*, for the appellants (*Messrs. Melosh & Morten*, on the brief).

*Mr. John J. Crandall*, for the respondents.

The opinion of the court was delivered by

GARRISON, J.

In the view that we take of this case it is not necessary to determine whether the deposition of Mr. Bourgeois as to the statements made to him by Mrs. Weaver was properly admitted in evidence or to decide whether she in fact stated to him that her son, Theodore, had made the deed to her to protect his children, and that she was to hold the deed for the children, and had no interest in it excepting to see that Theodore's children got their father's share of the farm. For the purposes of this appeal it may be assumed not only that Mrs. Weaver made all of these statements, but also that they correctly represented her understanding of the transaction and her attitude and intentions with respect thereto from the day the deed was delivered to her down to the day that its loss was discovered. Assuming all of this to be so the salient fact remains that in 1889 Theodore S. Weaver executed and delivered to his mother, Josephine T. Weaver, the deed in question, which remained in her possession until its loss in 1903, during all of which period the legal title (which must have resided somewhere) was in one or the other of the parties to the said deed. If the title remained in Theodore it is now in his heirs; if it passed to Josephine she, notwithstanding the disappearance of the deed, still holds the title subject to such trusts only as are enforceable under the statute of frauds. Wherever, in fine, the legal title was from the time of the delivery of the deed to that of its disappearance there it now is. Hence, in our judgment, to decide where the title was during that period is to decide this case.

The question that is thus fundamental is essentially one of fact and resolves itself into the single inquiry whether the deed that was delivered by Theodore to his mother was accepted by her; or perhaps the question is still narrower, viz., whether after such a lapse of time acceptance of the deed as of the date of its delivery will not be inferred unless some stronger inference points to the opposite conclusion.

That there was a good delivery of the deed is not questioned, nor is it even suggested in proof or in argument that at the

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time of its delivery Mrs. Weaver refused to accept it or that she had any conceivable motive for so doing.

On the contrary, her understanding that the deed was delivered to her in the interest and for the protection of her grandchildren afforded the strongest possible motive for accepting it, so strong indeed as both upon reason and principle to assimilate the transaction with those in which acceptance is to be inferred from the beneficial character of the conveyance. If, however, the grantee's understanding of the purposes for which the deed was delivered to her is to be ignored because not legally manifested, then the deed for which no consideration passed was, in such legal point of view, a gift, and would, without doubt, have been so treated if attacked by the creditors of the grantor. From whichever standpoint therefore the transaction be viewed, it was one to which the inference of the acceptance of a benefit is applicable. It has been held that the delivery of a deed to a third person passed title *eo instante* upon the ground that, nothing appearing to the contrary, it is to be inferred that a grantee accepts what is for his benefit. *Jones v. Swayze*, 42 N. J. Law (13 Vr.) 279.

*Traurig v. Gelb*, 70 Atl. Rep. 352, in which the court of errors and appeals cited *Jones v. Swayze* as authority for "the rule that the law will presume that a man accepts what is for his benefit," was a case in which delivery was made to the grantee directly and not to a third person, and it must be that the inference that obtains when the grantee is not present and is not informed will *a fortiori* apply when he is both present and acquainted with the contents of the deed and takes it into his possession. Cases illustrative of this rule are collected in 9 Am. & Eng. Encycl. L. 162; see, also, *Matheson v. Matheson*, 117 N. W. Rep. 755. In addition to, or, if need be, quite independently of, the foregoing consideration, the fact that Mrs. Weaver retained the deed for fourteen years after its delivery to her by her son, raises an inference of her having accepted the deed that can hardly be said to be weakened, and that certainly is not overcome by the fact that she did not give publicity to a family matter by spreading the deed on the public records. The declarations of the grantee that Theodore's share belonged to

his children, while evidential of the purpose for which the deed was made to and held by her, have no bearing upon the question as to where, upon an uncontroverted state of facts, the legal title resided. The inference of acceptance arising from lapse of time and the other circumstances adverted to is so strong and so entirely un rebutted that the only conceivable hypothesis at all consistent with the retention of the title by Theodore during the fourteen years that followed his delivery of the deed is that during all of such period such instrument remained in a sort of escrow so that the legal title did not pass under it until the happening of some event or the performance of some condition. Such hypothesis, however aptly it may account for the conduct of the parties, runs directly counter to the imperative rule that a deed cannot be in escrow with its grantee. The soundness of Chief-Justice Beasley's exposition of this subject in *Ordinary v. Thatcher*, 41 N. J. Law (12 Vr.) 403, has never been questioned in this state. The rule everywhere is that the delivery of a deed to its grantee cannot be in escrow, but is, regardless of such purpose, a good delivery of the deed. 11 Eng. & Am. Encycl. L. 333, "Escrow;" 16 Cyc. 561, "Escrows."

The stability of all titles to land rests at bottom upon this rule.

The conclusion, therefore, seems to us to be irresistible that from 1889 to 1903 the legal title to Theodore's interest in the farm was in the grantee of his deed, viz., Josephine T. Weaver, the appellant. This conclusion must also have been assumed by the learned vice-chancellor before he could consistently regard Mrs. Weaver in the light of a donor of such interest. For when he says that Mrs. Weaver "was making a gift to her children," and was "in the position of a donor whose gift was completely executed," he was in effect assuming her acceptance of the deed without which she would have had nothing to donate and could not have held the position of a donor. Excepting as such acceptance is thus implied we cannot adopt the reasoning by which the conclusion is reached that an executed gift resulted from the destruction by Mrs. Weaver of the deed, chiefly from the consideration that there is no express finding of fact that Mrs. Weaver did destroy the deed or any testimony that would sup-

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port such a finding. The other ground of the decision below, viz., that of the voluntary execution of an unenforceable trust seems to involve the same implication as to the acceptance of the deed. For a trust, whether enforceable or unenforceable, must exist in order to be a trust, and, in order to exist, must be supported by the legal estate which in the present case could have become vested in Mrs. Weaver in no other way than by her acceptance of Theodore's deed. Further than this we cannot go with the court below, not only because it was not proved that Mrs. Weaver destroyed the deed with the object of executing a trust, but also because, in our opinion, the acts that she did were entirely ineffectual for such object. The underlying legal estate essential to the conception of a trust is neither annulled or transferred by the loss of the deed that conveyed it or by withholding such deed from record or by both combined; the title to land, if once vested in a grantee, cannot, in legal contemplation, be revested by the grantee in the grantor or his heirs or transferred to strangers save by an appropriate documentary act.

Fifty years ago Chancellor Green, in the case of *Wilson v. Hill*, 13 N. J. Eq. (2 Beas.) 143, declared that "the rule of the common law is perfectly well settled that the cancellation of a deed by consent of parties will not divest the grantee or revest in the grantor an estate which has once vested."

How far a court of equity may go in giving effect to the cancellation, destruction or surrender of an unrecorded deed cannot properly or profitably be discussed upon this appeal, where, in the absence of proof of any of these essential acts, nothing but *dicta* could result.

The question was suggested seventy years ago by Chancellor Pennington's statement in *Faulks v. Burns*, 2 N. J. Eq. (1 Gr. Ch.) 250, that "the parties to a deed in a case not affecting third persons may, by agreement, cancel it if it be not recorded," and the entire subject, which is one of great interest, is treated in a comprehensive note to the case of *Matheson v. Matheson* (already cited), as reported in 18 Lawy. Rep. An. (N. S.) 1167.

The learned vice-chancellor, in support of the conclusion reached by him, cites 15 Am. & Eng. Encycl. L. 1169, note 5.

The title in the *Encyclopedia* is "Implied Trusts," and the text annotated is as follows:

"Though under the statute no trust results in favor of the person by whom the purchase-money was paid still, if the grantee voluntarily executes the trust, such execution is binding upon him, and cannot be recalled."

This text predicates the due execution of a resulting trust, and the cases cited in note 5 in support of it are all cases either of resulting trusts involving actual fraud or of attempts to invoke equitable powers in aid of a fraud, hence neither the text nor the cases throw any light upon what will constitute the due execution of an express trust which is the question *sub judice*.

Assuming, therefore, but not deciding, that the voluntary destruction by Mrs. Weaver of the unrecorded deed with the intent thereby to execute the parol trust, might afford a foundation for the decree rendered in the court below, it is none the less true that the fact of such destruction must be put in issue and established like any other essential fact. This was not done inasmuch as there was no such allegation in the bill, no adequate proof produced at the trial, no such issue raised or tried out in the court below, and, finally, no such contention made in this court.

Our conclusion on the whole case is that Josephine T. Weaver in 1903 was lawfully seized of her son's estate and interest in the Weaver farm, and that since that time she has not, by any method known to the law, divested herself of such estate. This leads to a reversal of the decree of the court below upon strictly legal grounds, the case being barren of any equities unless the appellant Josephine T. Weaver by her admissions, in the course of litigation or otherwise, has estopped herself from asserting her legal title.

The vice-chancellor failed to discover such an estoppel, and in this we think he was quite right, for the admissions and declarations of the appellant, while evidential against her, lacked the essential element of an estoppel, viz., they did not induce any action or inaction or change of status in the respondents.

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The result reached is that the decree of the court of chancery should be reversed to the end that the complainants' bill be dismissed, and the appellant Josephine T. Weaver suffered to proceed with the remedy provided by statute in the case of a lost deed.

*For affirmance*—None.

*For reversal*—THE CHIEF-JUSTICE, GARRISON, SWAYZE, REED, PARKER, BERGEN, VOORHEES, MINTURN, BOGERT, VREDENBURGH, VROOM, GRAY, CONGDON—13.

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GEORGE EWALD, respondent,

v.

SOTER STEPHEN ORTYNSKY et al., appellants.

[Submitted July 3d, 1909. Decided November 15th, 1909.]

A defendant who has demurred to a bill in chancery upon grounds going to the whole of the complainant's bill whose demurrer has been sustained on some of the grounds specified, cannot appeal from a subsequent order obtained on his own motion which assumes to sustain the demurrer on those grounds and overrule it on other grounds.

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On appeal from a decree of the court of chancery advised by Vice-Chancellor Leaming.

*Mr. Herbert Clark Gilson*, for the respondent.

*Mr. Harry B. Brockhurst*, for the appellant.



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The opinion of the court was delivered by

SWAYZE, J.

The appellant is the defendant in the case. It demurred to the bill of complaint for numerous causes. Four of these which went to the whole of the bill were held good by the vice-chancellor, and accordingly an order was made on the motion of the appellant allowing the demurrer. Later the appellant applied for a re-argument and obtained an order allowing the demurrer on the four grounds and overruling it on the others, and then appealed upon the ground that the demurrer should have been allowed on all the grounds specified.

Only those who are aggrieved can appeal. *Chancery act* (P. L. 1902 p. 545 § 111); *Coryell v. Holcombe*, 9 N. J. Eq. (1 Stock.) 650; *Green v. Blackwell*, 32 N. J. Eq. (5 Stew.) 768. The appellant clearly was not aggrieved by the first order, which was wholly in its favor. Nor is it aggrieved by the second order, erroneous though it is; for the effect of sustaining the demurrer on any ground was to sustain it altogether. Illustration may be found in cases where the reasons specified were held insufficient but the demurrer was sustained for a reason alleged *ore tenus*. *Stillwell v. McNeely*, 2 N. J. Eq. (1 Gr. Ch.) 305; *Barrett v. Doughty*, 25 N. J. Eq. (10 C. E. Gr.) 379; *Story Eq. Pl.* § 464. Although the order is erroneous, it was entered on the motion of the appellant as a substitute for a proper order in his favor. A party cannot appeal from an order procured by himself. *Hooper v. Beecher*, 109 N. Y. 609; 15 N. E. Rep. 742. To permit him to do so would simply open the door to unnecessary appeals. No better illustration can be found than this very case, since the second order could have had no possible object except to lay the foundation for this appeal.

The appeal is dismissed, with costs.

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6 Buch.In re N. J. Title Guarantee & Trust Co.

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In re account of NEW JERSEY TITLE GUARANTEE AND TRUST  
COMPANY.

[Argued July 2d, 1909. Decided November 15th, 1909.]

1. Under Orphans Court act (*P. L. 1898 p. 762 § 130*), authorizing the allowance to a trustee of such commission upon the income as the court deems just, provided that such allowance shall not exceed five per cent., the commission allowed may be less than five per cent., and ordinarily where the annual income is large the circumstances must be unusual in order to justify the allowance of that rate, though it may be properly allowed where the income is small.

2. Where a trustee has only administered an estate for seven years, during which time his only services had been to receive and disburse the income of investments already made, and the trust will probably continue for thirty or forty years longer, a commission will not be allowed the trustee on the *corpus* of the estate upon an accounting.

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On the appeal of Addie Estelle Acer from a decree of the prerogative court.

*Mr. William A. Smith* (*Messrs. Coult & Smith* on the brief),  
for the appellant.

*Mr. Gilbert Collins* (*Messrs. Collins & Corbin* on the brief),  
for the respondent.

The opinion of the court was delivered by

SWAYZE, J.

So far as concerns the commissions allowed the trustee upon the income of the estate, which were at the rate of five per cent., we think the circumstances of this case are sufficient to warrant the allowance of that amount, particularly in view of the fact that Mrs. Acer and her husband, who was a lawyer, both permitted the deduction of commissions at that rate without objection, and that a very large proportion of the estate was invested in the stock of a manufacturing corporation subject to the hazards of business and necessarily involving some risk to the trustee. In approving this allowance, however, we

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are not to be understood as approving the custom, if it be a custom, as suggested, of allowing a trustee five per cent. on the income in all cases. It is quite evident that a different test of the propriety of the allowance is prescribed by section 130 of the Orphans Court act. *P. L. 1898 p. 762*. The act authorizes the allowance of such commission upon the interest or income as the court shall deem fair and just, considering the actual pains, trouble and risk of the accountant. It then provides that the allowance shall not exceed five per cent.—a sufficiently plain intimation that it may well be less. No doubt in the case of estates where the income is small, five per cent. may be properly allowed in order to give the trustee compensation sufficient to induce proper men to assume the responsibility, but in a case like this, where the annual income is large, it must require unusual circumstances to justify the allowance of the full rate of commission, and we are not to be understood as holding that, even in this case, so large an allowance would be proper in the future.

As to the allowance of a commission upon the *corpus* of the estate, we think that the trustee has administered the trust for so short a time, and has had so little to do with making or changing investments, that no commission on the *corpus* ought to have been allowed. The *cestui que trust* is of such an age that it may fairly be expected that the trust will continue for thirty or forty years longer, and if the present commission were allowed to a trustee who has served some seven years only, and has practically done nothing but receive and disburse the income of investments already made, it might result in leaving too small a fund available for the payment of future commissions.

We think the decree should be reversed and the record remitted, in order that a decree may be entered disallowing the commission on the *corpus*.

*For affirmance*—VOORHEES, VROOM—2.

*For reversal*—THE CHIEF-JUSTICE, GARRISON, SWAYZE, REED, TRENCHARD, PARKER, BERGEN, MINTURN, BOGERT, VREDENBURGH, GRAY, CONGDON—12.

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6 Buch.Merchantville Field Club v. Wells.

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MERCHANTVILLE FIELD CLUB, respondent, complainant,

v.

JANE WELLS et al., appellants, defendants.

[Submitted July 5th, 1909. Decided November 15th, 1909.]

1. Under the act of March 2d, 1870 (*Gen. Stat. p. 3486*), a party who is in peaceable possession of lands, claiming to own the same, where his title is disputed, may maintain a suit in chancery to settle the title, where no suit to test the validity of the title is pending, notwithstanding it appears on the preliminary hearing as to jurisdiction that he claims under a conveyance from the executors under a will of one to whom, before the conveyance, he bore the relation of tenant.

2. A party claiming to be in peaceable possession of lands, claiming to own the same by virtue of a conveyance to him from the executors under a will, is not required to prove the due execution of the will in order to confer jurisdiction upon the court of chancery to retain his suit under the act of March 2d, 1870. *Gen. Stat. p. 3486.*

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On appeal from an order of the court of chancery advised by Vice-Chancellor Leaming.

*Mr. David H. Goff* and *Messrs. French & Richards*, for the appellants.

*Mr. Lewis Starr* and *Mr. Frederick A. Rex*, for the respondent.

The opinion of the court was delivered by

TRENCHARD, J.

The bill in this cause was filed by the Merchantville Field Club to quiet the title to a tract of land in Camden county pursuant to the provisions of the act of March 2d, 1870, entitled "An act to compel the determination of claims to real estate in certain cases, and to quiet the title to the same." *P. L. 1870 p. 20; Gen. Stat. p. 3486.*

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The bill avers that the complainant, a corporation of New Jersey, purchased of William H. Alden and M. Mabel Smith, executors and trustees under the last will and testament of Clara P. Cazier, deceased, dated June 5th, 1902, for full consideration, and the trustees conveyed to the complainant in fee-simple the lands and premises described therein; that subsequently, when some question arose as to the proper execution of that will of Miss Cazier, the complainant, for the purpose of perfecting its title, obtained a deed from one William L. Worcester, surviving executor and trustee named in a former will of the same testator, dated October 16th, 1890, by which the executor in the last named will conveyed all the right, title and interest of Miss Cazier in the same lands; that by virtue of such conveyances the complainant became and is the owner of such lands and at once assumed possession thereof, since which time it has been in the peaceable possession of the lands, claiming to own the same; that the heirs of Miss Cazier claim that her wills were not executed as required by law; that her heirs dispute and deny the title of the complainant, and that no suit is now pending to enforce or test the validity of such claims.

The defendants, heirs-at-law of Clara P. Cazier, answering, denied that the complainant became seized and possessed of the lands and premises, as claimed in the bill, but on the contrary alleged that Miss Cazier died intestate and that the title to the lands descended to her heirs-at-law; they admit that the lands are in the possession of the complainant, but aver that such possession is by virtue of a lease made by Clara P. Cazier in her lifetime; and they also deny that the complainant is in possession of the lands claiming to own the same.

Upon the issue thus framed the complainant submitted its proof for the purpose of establishing the jurisdiction of the court under the statute, whereupon the vice-chancellor found that the essential jurisdictional facts had been established and that the complainant was entitled to maintain its suit, but awarded an issue at law to try the validity of such claim, in accordance with the application of the defendants.

The defendants appeal from that part of the order which

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finds jurisdictional facts sufficient to enable the complainant to maintain its suit.

Section 1 of the act of March 2d, 1870 (*Gen. Stat. p. 3486*), gives a party who is in peaceable possession of land, claiming to own the same, where his title thereto is disputed, a right to maintain a suit in chancery to settle the title, where no suit to test the validity of the title is pending.

In the present case it is not disputed that the vice-chancellor was justified by the pleadings and proofs before him in finding that—*first*, the title to the lands in question was in dispute, and *second*, that there was no suit pending to test the validity of the title.

The sole contention of the defendants is that the record before the vice-chancellor did not justify him in finding that the complainant was in peaceable possession of the *locus in quo*, claiming to own the same.

We think there is no merit in the contention.

At the hearing for the purpose of establishing the jurisdiction of the court the complainant offered in evidence the deed from the executors under the will of Miss Cazier, dated June 5th, 1902, which recites the seisin of John R. Cazier, the latter's will, dated October 16th, 1890, devising all his property to his sister Clara, her death and the execution and probate of her last will and testament devising all the property to the grantors as executors and trustees, and the conveyance by such executors and trustees to the complainant of the *locus in quo* for a consideration of \$3,800, which was paid by the complainant. The complainant also proved actual physical possession of the lands in question. Moreover, such possession is admitted by the answer.

But the defendants contend that complainant's possession was not under a claim of ownership for the reason that its possession originally was that of a tenant under Miss Cazier in her lifetime, and that such claim cannot be made in view of the well established doctrine that a tenant cannot dispute his landlord's title.

The fallacy of this contention is in the lack of foundation for the premise upon which it rests. While it is true that the evi-

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dence disclosed that the complainant at one time was in possession of the premises in question as a tenant, under Miss Cazier's brother, and subsequently under her, yet it conclusively showed that, at the time the bill was filed and for a considerable period prior thereto, it was in possession by virtue of a deed from the executors of Miss Cazier for which it paid full consideration. Certainly, under such conditions, the complainant is not precluded from claiming ownership of the land.

The defendants further insist that there was no proof that the title to the land in question was transmitted from Miss Cazier to the complainant. But we have already pointed out that this was shown by the deed from her executors to the complainant. The argument of the defendants seems to be that it was necessary for the complainant to prove the due execution of the will of Miss Cazier. We think not. To require the complainant to establish, in this initial stage of the proceedings, the due execution of the will, would impose upon the court the obligation then to pass upon the real question in dispute, not the jurisdictional facts. No such duty rested upon the court in this preliminary proceeding. In the first instance it was concerned only with jurisdictional facts. These were shown by proof of peaceable possession of the lands under claim of ownership by virtue of the deed and that no suit was pending to settle the basis of the defendants' assertion of title.

The result is that the order of the court below is affirmed. .

*For affirmance*—THE CHIEF-JUSTICE, GARRISON, SWAYZE, REED, TRENCHARD, PARKER, BERGEN, VOORHEES, MINTURN, BOGERT, VREDENBURGH, VROOM, GRAY, DILL, CONGDON—15.

*For reversal*—None.

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6 Buch.Worth v. Watts.

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NATHAN WORTH, complainant, respondent,

v.

ERNEST WATTS, executor, &amp;c., of Firman Dubel, deceased, defendant, appellant.

[Submitted June 17th, 1909. Decided November 15th, 1909.]

A court of equity, when asked to decree the specific performance of a contract, will examine not only the contract itself, but the relations of the parties and the surrounding circumstances; and if by reason of inadequacy of consideration and the other circumstances of the case, there is reason to suspect fraud, specific performance will be denied, and the complainant left to his remedy at law.

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On appeal from a decree advised by Vice-Chancellor Leaming, whose opinion is reported in 70 *Atl. Rep.* 357.

*Mr. Eckard P. Budd* and *Mr. Joseph H. Gaskill*, for the appellant.

*Mr. John W. Wescott* and *Mr. Alexander J. Brian* (of Pennsylvania), for the respondent.

The opinion of the court was delivered by

PARKER, J.

The bill was filed by the vendee named in an alleged contract to sell real estate against the executor of the vendor named therein, for a decree that the executor make a deed of the real estate in performance of the contract.

A preliminary question was mooted at the argument in this court, whether in view of the death of the vendor, the language of his will, and the fact that the beneficiaries thereunder were not parties defendants, an effective decree of specific performance could be made. The point having been made for the first time



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in this court, and then upon the oral argument, we deem it inadvisable to pass upon it, as the case may be disposed of on its merits.

The basis of the suit is a paper-writing dated February 2d, 1904, purporting to be an agreement by Firman Dubel, and of which the following is a copy:

"Office of Nathan Worth, Dealer in General Merchandise, 303-305 High street. Telephone Call No. 49, Burlington, N. J., Feb. 2, 1904." (Then in writing) "Received from Nathan Worth twenty-five hundred dollars (\$2500.00) on account of purchase price for houses and lots 303 and 305 High street, and 20 and 22 Union street, Burlington, N. J., which I agree to sell to him clear of all encumbrances for four thousand dollars (\$4,000.00), deed to be delivered on payment of the balance of money. he to continue payment rent as before until balance paid. Firman Dubel."

There were also six other papers in the form of receipts for various amounts, dated between June 17th and November 1st, 1904, and amounting in all to \$1,300. They are precisely alike except as to date and amount, and the absence from one or two of the printed heading; and only the first is copied here:

"Office of Nathan Worth, Dealer in General Merchandise, 303 and 305 High street. Telephone Call No. 49, Burlington, N. J. June 17, 1904.

"Received of Nathan Worth Two Hundred and Fifty Dollars (\$250.00) as payment for properties 303 and 305 High street and 20 and 22 Union street. Burlington, N. J., agreed to be sold by me to him as per receipt of February 2, 1904. Firman Dubel."

The signatures to all these papers are admittedly in the handwriting of Firman Dubel; the body of them all, admittedly in the handwriting of Worth, the complainant. It was established by a number of reputable witnesses and found as a fact by the vice-chancellor, that the property comprised in the agreement was worth in the market between eight and ten thousand dollars, and in all probability in excess of nine thousand dollars. The contract price was therefore so inadequate that standing alone it would raise grave suspicion of fraud in the procurement of the contract. This feature of the case appealed strongly to the vice-chancellor, but seems to have been overcome by what he evidently found to be a fact, viz., that after the date of the contract the six other re-

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ceipts for payments on account were signed, all referring to the agreement of February 2d, 1904, and therefore in the vice-chancellor's opinion reaffirming the original paper as a contract; and the force of these receipts was not overcome in his mind by the other testimony in the case tending to discredit them. In view of these receipts and of other considerations appearing in his opinion, he concluded that the defendant had failed to show that the paper of February 2d, 1904, was not the intelligent and deliberate act of the testator, and accordingly decreed specific performance of it. That decree is now before us for review.

The evidence is voluminous, but the facts are not complicated. Firman Dubel died December 28th, 1904. For some time previous to his death he was an habitual drinker, and during the last year or so of his life was a heavy drinker, increasingly under the influence of liquor as the day wore on, and frequently intoxicated in the afternoon. He was a bachelor and regarded as a miser. He owned a number of properties in Burlington, among which was the property 303 and 305 High street, rented by complainant, Worth, and occupied by him for stores and dwelling at a rent of \$40 per month.

In the spring of 1904, according to Watts' testimony, while Dubel was ill and could not collect his own rents, and Watts was therefore managing the property, Worth came to him and pleaded for a reduction of rent, on the ground that he could not afford to continue at the rent he was paying, and offered to compensate Watts if he would use his influence with Dubel to get a reduction to \$35. It does not appear that any reduction was made, but in August considerable repairs to the plumbing were made, and paid for by Dubel, and in December, just before his death, some further repairs were made. The first notice to Watts that Worth had any claim as purchaser of the property was on the day after Dubel's death, when Worth called at Watts' office and informed him of his claim under contract of purchase. He subsequently submitted the papers to Watts and intimated that he would pay him for helping the matter through, which Watts declined to do.

The story of the signing of the agreement and subsequent receipts as related for the complainant mainly by his wife and daughter, is that there was a sort of social intimacy between

Worth and his family, and Dubel; that Dubel was sometimes their guest at meals, had to some extent the run of the house, made little presents to the children, and so on; that on the occasion when the agreement of sale was signed by Dubel, according to Mrs. Worth's testimony, the parties were in Worth's apartments and there agreed orally on all the terms, and Dubel said he did not wish anyone to know until the deed was made; that Worth said Mr. Watts would have to draw the "bill of sale" and Dubel said no and told Mr. Worth to draw it himself. Worth objected, saying he had never done anything like it, but being urged by his wife, "went into the store and took paper and pen and ink and a dictionary and drew this bill of sale \* \* \*" (meaning the agreement and receipt for \$2,500). Mrs. Worth says she saw the money paid in bills and the agreement signed, and was also a witness to the signing of the six additional receipts and saw the money paid also when they were signed.

Bearing this evidence in mind as we examine the form and contents of the papers on which the complainant's claim is based, the first thing noticeable is the legal sufficiency and precision of the so-called contract, combined with brevity and terseness. It contains, exclusive of date and signatures, less than seventy words, but is absolutely complete in itself, with names of parties, description of property, price, and terms as to encumbrances, delivery of deed, and status of the parties as landlord and tenant until the transaction be closed. It is a document to evoke appreciation from a lawyer. Yet the testimony of complainant's wife is to the effect that this admirably drawn paper was prepared on the spur of the moment by her husband, a small tradesman of but limited education, with the aid of a dictionary, and that he was willing to risk \$2,500 in cash on its legal sufficiency or on his personal confidence in Dubel, or both. The receipts also are very full and specific and apparently the production of at least a well educated business man. The clause in the agreement providing for delivery of deed may also be significant. Deed is to be delivered on payment of balance of the purchase-money, thus enabling Worth to choose his own time for completing the transaction, and to wait, if this was his intention, and if there was any fraud in the agreement, until Dubel's lips were sealed by death

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and the obligation could be asserted with less danger of successful challenge. These features of the agreement tend, in our judgment, seriously to impeach Mrs. Worth's testimony as to its preparation and execution.

The gross inadequacy of the consideration has already been mentioned. Its importance as a badge of fraud is emphasized by the fact that the property was subject to a mortgage of \$2,000, so that by agreeing to convey a \$9,000 property for \$4,000, Dubel was in fact agreeing to sell a \$7,000 equity for \$2,000, plainly a more grossly inadequate consideration than ever, and one more likely to satisfy a court that Dubel must have been deceived into signing such a paper.

Again, Worth's delay in completing his purchase is worthy of note. Irrespective of the fact that in view of the \$2,000 mortgage, he had paid for the property and \$500 over on delivery of the agreement, unless Dubel paid off the mortgage (which he did not do), it is evident that so long as Worth delayed taking his deed he was losing the use of the money paid by him while at the same time paying rent. It would have been a simple matter to raise the \$1,500 remaining to be paid by negotiating a mortgage, and this course would at once have stopped the payment of rent. That a man of Worth's characteristics, claiming to be too poor to pay \$40 rent, and yet wealthy enough to pay \$2,500 in cash on short notice, or no notice, should have permitted the rent to run on month after month under such circumstances, unless he had some ulterior motive, is almost inconceivable.

There are other facts in the case, not so important, but worthy of consideration: The petty amount of Worth's bank deposits as shown by his bank account; the fact that not one of the alleged payments on the contract was made by check, though Dubel received many checks from other debtors; the evidence that Dubel was accustomed to sign receipts without reading them, especially when intoxicated; the repairs and improvements made by Dubel on the building after the date of the contract—all these support the suspicion aroused by the inadequacy of price and the circumstances surrounding the alleged original transaction. Taking all together, the low price, the form of the agreement, the fact that Worth wrote it and the receipts, the secrecy observed during

Dubel's lifetime and its immediate assertion after his death, Worth's apparent poverty as contrasted with the considerable payments recited in the papers, his apparently intentional omission to secure a deed in Dubel's lifetime, and his attempt to secure the executor's aid in consummating the sale, we think a strong case of fraud was made out. The court below laid great stress on the existence of six receipts apparently affirming the contract of February 2d. These papers were undoubtedly signed by Dubel; if his signature was not procured by fraud, they are cogent evidence that some agreement of sale was in fact made on February 2d. Some suspicion is cast on them also by the evidence, but even if genuine and *bona fide*, they affirm nothing more than that Dubel had agreed to sell the property to Worth. As to the price they are silent. Dubel may well have agreed to sell for \$10,000 and received \$2,500 or some other sum, on account, and been induced to sign an agreement stating the purchase price as \$4,000, believing it to state the true figure. So that if the receipts are genuine they are still not proof that the purchase price was truly stated in the contract.

The question then is, whether in view of the evidence in this case, a court of equity should decree specific performance. The law is well settled. In *Crane v. DeCamp*, 21 N. J. Eq. (6 C. E. Gr.) (at p. 418), Justice Scudder, speaking for this court, said: "This is an application addressed to the sound legal discretion of the court. There is no rule in equity more clearly established, than that upon application for a specific performance of a contract, the court must be satisfied that the claim is fair, reasonable and just, and the contract equal in all its parts. If these points are not established by the complainant he will be left to his remedy at law (citing authorities). In judging of the fairness of a contract, the court will look not merely at the terms of the agreement itself, but at the relations of the parties and all the surrounding circumstances" (citing *Fry Spec. Perf.* § 239). In 1831 Chancellor Vroom said, in *Rodman v. Zilley*, 1 N. J. Eq. (Saxt.) 320, 324: "Courts of equity seldom interfere to set aside sales and contracts on the ground of inadequacy of price. They leave the parties to their legal remedies. But when they are called on for extraordinary aid to enforce a contract, they take

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the liberty to examine into the consideration to be given, its fairness and equality, and all the circumstances connected with it. And if anything manifestly inequitable appears in that part of the transaction, they will never lend their power to carry the contract into execution."

It is true that courts of equity will not interfere with bargains on the ground of inequality alone, unless it be so extreme as to shock the conscience, and so amount to evidence of fraud. The cases of *Wintermute v. Snyder*, 3 N. J. Eq. (2 Gr. Ch.) 489; *Shaddle v. Disborough*, 30 N. J. Eq. (3 Stew.) 370, and *Phillips v. Pullen*, 45 N. J. Eq. (18 Stew.) 5, cited by the vice-chancellor, so hold.

But in both *Wintermute v. Snyder* and *Phillips v. Pullen*, there was a direct attack on the instrument itself, and the court was asked to set it aside, which is a very different thing from refusing its specific enforcement. In *Shaddle v. Disborough* the court decreed specific performance, but on a finding that there was no fraud and no inadequacy of price. It was remarked by the chancellor in that case, that "unless the inadequacy is such as to shock the conscience of this court and in itself to amount to conclusive and decisive evidence of fraud in the transaction, a defence to such an action as this, based on that alone, will not avail." We need not pass on the accuracy of this proposition because the present case does not fall within it. Taking, in connection with the inadequacy of consideration, the other circumstances of the case as detailed above, we are of opinion that such an atmosphere of suspicion surrounds and permeates the whole case that a court of equity, governed by the principles laid down in *Rodman v. Zilley* and *Crane v. DeCamp*, should refuse the relief by way of specific performance as prayed for in the present bill.

It may be that some contract of sale was made, and that moneys were paid thereon by Worth. If he can establish such facts in a court of law, he may have his remedy there by way of damages or a return of the moneys paid; but specific performance of the alleged contract set up in the bill should be denied. The decree of the court of chancery will accordingly be reversed, and its record remitted with directions to dismiss the bill of complaint.

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*For affirmance*—None.

*For reversal*—THE CHIEF-JUSTICE, GARRISON, SWAYZE, REED, TRENCHARD, PARKER, BERGEN, VOORHEES, MINTURN, BOGERT, VREDENBURGH, VROOM, GRAY, DILL, CONGDON—15.

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NOAH C. ROGERS, appellant,

v.

HELEN FOUNTAIN GENUNG et al., respondents.

[Submitted June 25th, 1909. Decided November 15th, 1909.]

Where one engages to conduct, and enters into, negotiations for the purchase of lands for another, and is informed by his principal that he desires to purchase two adjoining tracts in order to make one property of them, a confidential relation arises, and the agent cannot, in equity, purchase on his own account one of the tracts and hold it against the interest of his principal, for one who undertakes to act for another may not, in the same matter, act for himself, and this rule extends to all cases in which confidence has been reposed, and applies as strongly to those who have gratuitously undertaken the trust, as to those who are to be paid for it. It is sufficient that the party undertaking the negotiations accepted and held a situation of trust in reference to procuring the land, and every man has a trust to whom a business is committed by another where his business is to advise or operate, not for himself, but for others.

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On appeal from a decree of the court of chancery advised by Vice-Chancellor Stevens, whose opinion is reported in 71 *Atl. Rep.* 230.

Mr. Alfred Elmer Mills and Messrs. Collins & Corbin, for the appellant.

Mr. Charles A. Rathbun and Mr. Richard V. Lindabury, for the respondents.

The opinion of the court was delivered by

BERGEN, J.

The bill charges that Harvey J. Genung, while acting as a confidential agent or broker for the complainant in negotiating the purchase of two tracts of land known respectively as the "Murphy" and "Conkling" properties, betrayed his trust by buying for himself, in the name of his wife, the Conkling tract. When the bill was filed a contract had been entered into by the vendors and the wife, by the terms of which a conveyance of the Conkling tract was to be subsequently executed and delivered, and the prayer of the bill is that the wife be decreed to assign the contract to complainant. The vice-chancellor dismissed the bill, and from that decree this appeal is taken. The confidential relation which is alleged to have existed between Genung, the husband, and the complainant, rests upon the following facts, viz.: The complainant, desiring to purchase the two tracts, wrote a letter to Genung, who was a real estate broker, for a list of "small places that you have for sale, with prices, near Madison, Convent, or Morristown Station." This letter was dated May 14th, 1907, and three days later Genung wrote to complainant, mentioning several properties, among them the Murphy and Conkling tracts, stating as to the former, "price \$15,000," and as to the latter, "offered at \$8,000." To this the complainant replied that these tracts would be of the most interest to him, and that he would be glad if Genung would ascertain the lowest prices, and what amount could remain on mortgage, and rate of interest.

The next step in the proceedings was an interview between Genung and complainant, during which complainant told Genung that he wanted both plots, and therefore the negotiations should run together, and Genung advised him to offer \$13,000 for the Murphy tract, and \$7,000 for the other, as \$6,500 had been refused. The sale of the Murphy tract to complainant was accomplished, and that part of the negotiations has no relation to the present controversy, beyond the fact that Genung knew that the purpose of the complainant was to purchase both tracts, as a



part of a scheme to make them one property, an intention which complainant had disclosed to him at the opening of the negotiations for the purchases. The instructions, as testified to by complainant, were:

"Conduct the negotiations as one, because if I buy one I want to buy both, I want to buy them for a plot, and I want them pushed along simultaneously. \* \* \* I don't want the information that I bought one to get to the owner of the other plots, because they might recede from their asking price."

The defendant Genung testifies on this point that complainant said he would take up "the negotiations of the properties independently and get whichever one he could, or both." We are not disposed to accept this as a denial of complainant's testimony, for the conduct of both parties indicates that at the outset it was understood that complainant wished to purchase both tracts, and are of opinion that the independent negotiations which Genung speaks of only referred to separate dealings with different owners.

With respect to the Conkling tract it appears that on June 4th, Genung reported that the Conkling property could probably be bought for \$7,000 if Mr. Conkling was allowed to remain in the house and on part of the property for his life, but complainant, thinking it more desirable to have possession, authorized Genung to find out whether possession could not be had for a greater price, which he agreed to do. Complainant also requested Genung to go to Mr. H. C. Pitney, Jr., his attorney, after the negotiations had reached a point when the sale was likely to be accomplished, and have the contract drawn so that it could be promptly executed when an agreement was reached.

Mr. Pitney testifies that during the forenoon of June 5th, 1907, Genung came to his office and told him that the complainant was *negotiating through him* for the purchase of a piece of property, and had directed him to come to Mr. Pitney and have him prepare a form of agreement which he, Genung, could take with his report to the complainant on the evening of that day. Genung was unable to give the names of all the owners or a precise description of the land, and it was arranged that Mr. Pitney should get the description of the land from the records of

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Morris county, and that Genung should get the correct names of the owners. Genung called at Mr. Pitney's office a few minutes before six o'clock on the afternoon of June 5th, and asked for the agreement, but Mr. Pitney told him it was not ready, and that he could either wait for it or have it sent to him later, but Genung said that he could not wait because he must meet the complainant a very few minutes after six at the Morristown Inn, and that he could get along without it that evening. As Genung did not come for the agreement during the next day, Mr. Pitney telephoned him on the 7th, in response to which he came to the office, and Mr. Pitney showed him the draft of the agreement, and thereupon Genung said that the agreement would not be used; that the complainant was out of the negotiation, and that he, Genung, would like to take the papers. To this Mr. Pitney demurred, but upon the assurance that Mr. Rogers was out of it, he finally gave him the agreement, and all of the papers except a short memorandum which Genung had brought to him on the 5th day of June. This memorandum was partly in the handwriting of Genung, and partly in that of Mr. Pitney, that written by Mr. Pitney being instructions from Genung. The following is a copy of the material part of the memorandum:

"Present absolute title and possession of the whole. \$8,000. Reservation of possession of the lower part during life of W. H. Conkling, \$1,000. This in option of purchaser. Consideration \$8,000. Title one month after agreement. 10 per cent. or \$800 on ex-agreement, balance on taking deed."

It thus appears that on the 5th of June, Genung, acting for the complainant, had gone to his counsel and told him that the complainant was negotiating through him for the Conkling property, and requested him to draw a contract according to the memorandum, part of which he had prepared, and part of which was prepared in his presence and under his direction by counsel, and that counsel did prepare the contract as instructed by Genung. On the same night the complainant, on his way from the train to his home, called upon Genung, who then stated that the Conklings "probably" would not sell at all except subject to a life interest. The interview was somewhat hurried, as the

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complainant had a dinner engagement, but he told Genung that he wanted him to increase the price to \$7,250, or \$7,500, and, if necessary, to \$8,000, if Conkling would give up his possession, and Genung agreed to do this, and said that he would report the next evening. On the evening of the next day, June 6th, complainant again stopped at the inn to see Genung and learn whether the Conklings would accept the higher price for the land with immediate possession, and Genung said:

"One thing is sure. they have decided that they won't sell except subject to a life lease, they won't take a higher figure, and they will sell only subject to a life lease."

To this the complainant replied:

"Very likely I will take it; anyhow I will telephone you, but very likely I will take it, but I would very much rather give a higher price and eliminate the life lease."

To this Genung replied: "I don't think that is possible," and complainant replied, "then I will let you know to-morrow whether I will take it with the life lease or not; I will communicate with you from New York."

When this last conversation took place Genung knew that his wife had made a contract with the Conklings to take the property for \$7,000, subject to the life estate, which had been secured under the following circumstances: Genung, although he had directed Mr. Pitney to draw a contract in the interest of the complainant, and had agreed to submit complainant's offer of \$8,000 for immediate possession, and to report the result to him that evening, took his wife with him to the Conkling place with a blank contract ready to be filled up, and a blank check to be signed by his wife, and after reaching the Conkling farm Genung asked the owners, according to the testimony of Mr. Fairchild, "If they would consider \$8,000 and get out of the place in six months, or something like that, or at a stated time to be agreed upon," which the Conklings declined, and then Genung said: "Well, then, we will give you the \$7,000 with the life right," and thereupon the contract under consideration was executed.

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It appears that on the 4th or 5th of June, during an interview between them, Genung asked complainant whether he had a right to represent any other person than complainant, in the negotiation, and in reply was told, "Decidedly no, while you are representing me confidentially and submitting my offers I don't consider you have a right to represent anybody else or go into it with anybody else," and that if Genung did not want to conduct the negotiations for complainant he would get another broker. To this Genung made no reply, but as he continued to conduct the negotiations, it is presumed he did so upon the conditions thus stated.

We have no hesitation in finding from the evidence in this cause, that Mr. Genung engaged to act for the complainant in the negotiations for the purchase on complainant's behalf, of the Conkling property, from whom a duty arose on his part to act with entire good faith and loyalty for the furtherance and advancement of the interest of the complainant in the subject-matter of his agreement. That he understood that he was acting for the complainant in this particular matter is demonstrated, not only by his conduct towards the complainant, but by his statement to Mr. Pitney that the complainant was negotiating through him, that is, that he was acting for the complainant and in his behalf in the matter, and equity requires that where there exists, as in this case, a relation of trust and confidence between the parties, the agent be prohibited from acquiring rights antagonistic to his principal.

In this case Mr. Genung knew that the complainant was anxious to purchase the two tracts for the purpose of consolidating them into a single plot, and he undertook to negotiate for the complainant and agreed to ascertain the price, and report to him the conditions upon which the purchase could be consummated, and after he had obtained the confidence of the complainant and learned that he wished to buy both properties, and that he was so anxious to do it that he was willing to advance the price of one of them in order to secure immediate possession, he took advantage of that knowledge and contracted for the purchase in the name of his wife. The testimony shows that after

Genung had opened the negotiations he suspected that complainant was acting for an adjoining landowner named Jenkins, and the fair inference is that he obtained control of the title for the purpose of making complainant pay a largely increased price, for when he told the complainant that the land was sold he said: "It is going to be held for a long time, and they want a very large price." It seems to us that it is a clear case of bad faith and disloyalty to the interest of one for whom he engaged to act, and it does not matter in such case that the agent is a mere volunteer, or acts gratuitously. *31 Cyc. 1432, 1433.*

The general rule is that he who undertakes to act for another in any matter of trust or confidence shall not in the same matter act for himself against the interest of one relying upon his integrity. *Gardner v. Ogden, 22 N. Y. 327*, and cases there cited. *Davoue v. Fanning, 2 Johns. Ch. 260.* "So if an agent employed to purchase for another, purchases for himself, he will be considered as the trustee of his employer." *Story Eq. Jur. § 316.*

As was said by Vice-Chancellor Dodd, in *Wright v. Smith, 23 N. J. Eq. (8 C. E. Gr.) 106*: "The rule extends to all cases in which confidence has been reposed, and applies as strongly to those who have gratuitously or officiously undertaken the management of another's property, as to those who are engaged for that purpose and paid for it." In that case the complainant was anxious to purchase an interest in certain mineral lands, and the fee of other lands, and made known his wishes to Smith, the defendant, and told him what sums he would be willing, if necessary, to pay. Smith undertook as a friend to negotiate for their purchase, because it was thought he could buy to a better advantage than the complainant, who was to take title through Smith if he purchased. Smith purchased at a much less price than Wright had said he was willing to pay if necessary, but led Wright to believe that he had paid the highest sum he had intimated he was willing to give, and the bill was filed to bring Smith to an account. In holding the defendant to an accounting the vice-chancellor said, that the fact that Smith was not formally constituted an agent with authority to bind the com-

plainant, or that his agreement to act for him was not formally made, "are points, which, if true, are of no sort of importance, nor is it important that no agreement was made to compensate him for his services. It is sufficient that he accepted and held a situation of trust in reference to procuring the lands. Every man has a trust to whom a business is committed by another. Every man is a trustee whose office is to advise or to operate, not for himself, but for others." Therefore, if Genung had made the contract in his own name, his relations with the complainant were such that complainant had a right either to affirm or repudiate the contract, and if he manifests his desire to affirm, his agent cannot refuse to transfer it to him.

It is urged, however, that as Genung had the property for sale he was the agent of the vendor, and if he became the agent of the complainant in the purchase of the property, he was disloyal to his earlier employment.

We find nothing in the case upon which to base such an agency; there was none created by any writing which authorized Genung to sell, or to pay him commissions. The only promise he had was an oral one by Mr. Fairchild, which was, "if he could sell the place, why we would give him commissions." No price or terms were named; it amounted to nothing more than saying to a real estate broker, "if you produce a purchaser, and he and the owners can agree upon terms, and a sale is effected, we will pay you commissions." This imposed on Genung no duty to be observed towards the seller regarding the price; he was only a broker without any authority to offer terms; all that was expected from him was the production of a person ready to enter into negotiations with the owner, and the limit of his interest in the matter was to produce a purchaser with whom the seller might negotiate. The vendors in this case realized Genung's position, and with him suspected that Jenkins was the real purchaser and regulated their price accordingly. They accepted his offer, and made the contract with his wife, with full knowledge that he was acting for the purchaser, and in every respect treated him as a bidder for the land. Certainly they could not have understood that he was acting in their interest as against him-

self or his wife. The entire negotiations were conducted between them at arms length. The relation disclosed between the vendors and Genung is no answer to the fraud perpetrated by him in his dealings with the complainant, and he cannot be allowed to escape with the fruits of his wrong doing.

The defendants also urge that even if Genung was the agent of the complainant and was disloyal to his principal, nevertheless that does not affect the right of his wife to purchase even if she had knowledge of all the circumstances. We do not consider that we are required to pass upon this claim, because we are satisfied from the evidence that the purchase was, in truth and in fact, made by Genung, and that the wife was used by him as a cover to protect him against being required to account to his principal.

Equity looks at the substance, and not at the form of a doubtful transaction. What the husband knew was, that his principal was very anxious to purchase this property, and he had reason to believe that he would take the property at \$7,000, subject to the retention of possession by Conkling, during life, of a part of the premises if he could do no better. He also knew that the complainant was willing to pay \$1,000 more if the property could be had with immediate possession, and he had been engaged to make such offer. He had a very strong suspicion that Jenkins wished to buy the property, through the complainant, and if he could defeat the complainant and have the title vested in his wife, he would be in a position to exact a very large price. All of this, it is admitted, the wife knew, and it is fair to infer that she knew the purpose which her husband had in mind, because when they left home for the pretended purpose of making the offer for the complainant, they carried with them a contract ready to be filled up and executed, and also a check which the wife afterwards signed in payment of the percentage required, from which a presumption arises that he did not intend to submit the offer of the complainant fairly, and Mr. Fairchild, who seems to be a disinterested witness, testified that Mr. Genung was the spokesman, and his wife took no part in the negotiations; that Genung said, "We will give you \$7,000," thus in-

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dicating that he had some interest in the purchase. It is manifest from this testimony that Genung, when he left home, intended to buy the property, and also that the contract was made in the name of the wife, not as a *bona fide* purchaser, but under the direction of the husband for the very purpose of setting up the claim which he now urges in order to escape the fulfilling of his duty to the complainant, and while the marital relation would not perhaps prevent the wife from purchasing in her own right if she chose to do so, still that relation is an element to be considered in determining which of the two is the real purchaser. All transactions in which a wife claims to hold property in her own right, where it is the interest of her husband that she should do so to protect him against the claim of another, are always scrutinized with the utmost care when questioned, because of the relation of confidence and trust which is presumed to exist between them, and we are of opinion that the evidence in this case warrants the conclusion that the wife took the title for her husband, for the reason that if the contract was made with him the fraud would be so manifest that he could not support it, and that she acted for him, in order to aid him in carrying out his fraudulent intention. This property had been in the market for some time; the wife knew of it and had offered \$6,000 for it, and that being refused had abandoned the purchase, and the testimony does not show any further interest in the matter on her part until her husband had determined to defraud his principal, when she went with him, prepared to carry out his purpose. We find no reason to believe that the wife holds this contract as her own, but, on the contrary, that she joined her husband in the commission of a fraud upon the complainant and holds the contract for her husband subject to his direction and control.

The defendants also insist that if it be true that the transaction was carried out for the express purpose of defrauding the complainant, still he is without remedy, because the trust, not being declared in writing, is subject to the statute of frauds. But the statute does not apply where the "trust or confidence shall or may arise or result by implication or construction of



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law." No trust was created in this case by any agreement of the parties; it arose by implication or construction of law out of the confidential relations of the parties. Genung was not authorized to buy and hold in trust; his duty was to aid his principal in purchasing, and having been engaged to do this, he cannot, by any fraudulent act, during the period of his engagement, thwart his principal by making it impossible for him to accomplish his purpose, and if in carrying out such disloyal intent, he makes a contract of purchase in his own name, it is the contract of his principal.

The case shows that on the day the answer was filed an order was made by the chancellor permitting the defendants to execute the contract according to the terms, but restraining the defendants Genung from making any disposition of the land until the further order of the court. She and her husband will therefore be decreed to convey to the complainant, upon payment, to them, of the money paid as a consideration for the conveyance according to the terms of the contract.

The decree appealed from is reversed, with costs.

*For affirmance*—THE CHIEF-JUSTICE, REED, BOGERT—3.

*For reversal*—GARRISON, SWAYZE, TRENCHARD, PARKER, BERGEN, VOORHEES, MINTURN, VREDENBURGH, GRAY, DILL, CONGDON—11.

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6 Buch.Newark v. Erie Railroad Co.

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THE MAYOR AND COMMON COUNCIL OF THE CITY OF NEWARK  
et al., respondents,

v.

THE ERIE RAILROAD COMPANY and THE NEW YORK AND  
GREENWOOD LAKE RAILROAD COMPANY, appellants.

(No. 65. On appeal of the railroad companies.)

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THE MAYOR AND COMMON COUNCIL OF THE CITY OF NEWARK  
et al., appellants,

v.

THE ERIE RAILROAD COMPANY and THE NEW YORK AND  
GREENWOOD LAKE RAILROAD COMPANY, respondents.

(No. 81. On appeal of the city.)

[Argued June 30th, 1909. Decided November 15th, 1909.]

1. On a bill filed by a city against a railroad company to compel it to effect the crossing of its present tracks across a public highway in a city in some other manner than at the grade of said street, and for this purpose to construct and keep in repair good and sufficient bridges or passages over or under the said railroad tracks as at present constructed across said highway so that the passage of carriages, horses and cattle upon the street shall not be impeded thereby, and for further relief—*Held*, that the court of chancery correctly decided that the facts of the case did not warrant so drastic a remedy as track elevation or depression, but that it was unnecessary to determine whether the court of chancery had jurisdiction to order tracks to be elevated or depressed, and therefore that question is not passed upon or decided.

2. The relief afforded by a decree must conform to the case made out by the pleadings as well as the proofs. and that granted under the general prayer must be *secundum allegata et probata*.

3. Whether the court of chancery has jurisdiction or power to order railroad tracks crossing a highway to be removed therefrom, if they render the highway crossing dangerous for public use, on the ground that they have been illegally laid in such highway, is not passed upon or decided.

On cross-appeals from a decree of the court of chancery advised by Vice-Chancellor Stevens, whose opinion is reported in 75 N. J. Eq. (5 Buch.) 20.

*Mr. James R. Nugent and Mr. Herbert Boggs*, for the city of Newark.

*Messrs. Cortlandt & Wayne Parker (Mr. Charles L. Corbin, on the brief)*, for the railroad companies.

The opinion of the court was delivered by

VOORHEES, J.

These cases come into this court upon cross-appeals; that of the city of Newark from so much of the decree of the chancellor as denies a mandatory injunction, directing the defendants to effect their grade crossing over Summer avenue, in the city of Newark, in some other manner than at the grade of said avenue; that of the defendants, the railroad companies, from that part of the decree that adjudges that the two most northerly and the most southerly tracks laid across said avenue at grade are unlawful structures and impede the traffic upon the highway and interfere with its safe and convenient use by the public, and from that part of the decree that adjudges that the use, except as for a passing siding made by the defendants of the track lying between the most southerly track across said avenue, and known as Heller's switch track, and the eastbound main line track, impedes public travel on said avenue and unlawfully interferes with and impedes the passage of people, &c., using said avenue and renders the crossing unsafe, and that said use be prohibited, and commands the defendants to remove so much of said two most northerly tracks and the most southerly track as are laid within the lines of Summer avenue, and from using the remaining track above mentioned for any use whatever except for a passing siding for the sole purpose of shifting cars or trains of cars to and from the main line tracks so as to permit one car or train of cars to pass another car or train of cars while traveling on the main line tracks.

The appeals have been argued together in this court.

The facts of the case have been so clearly and with such careful detail set forth in the opinion of the learned vice-chancellor, reported in 75 *N. J. Eq.* (5 *Buch.*) 20, that it is needless to recount them here. Taking up the appeal of the city, we agree with the learned vice-chancellor in his conclusion that the facts of the case do not warrant so drastic a remedy as track elevation or depression, and that therefore on the merits of the case the appeal of the city should be dismissed, and the decree affirmed so far as that appeal has questioned it. But in placing our decision upon the grounds above stated, it becomes unnecessary to determine whether the court of chancery had jurisdiction to order the tracks to be elevated or depressed, and we therefore do not pass upon or decide that question.

In examining the appeal of the railroad companies, it will be necessary to consider the allegations and the prayer of the bill.

The prayer is for a mandatory injunction compelling the defendants to effect the crossing of the present tracks across Summer avenue in some other manner than at grade of said street, and for this purpose to construct, &c., bridges or passages over or under the said railroad tracks as at present constructed so that the passage of carriages, &c., shall not be impeded, and for general relief.

The opinion of the court below frankly states that "the allegations of the bill are so general that they present little more than the abstract question whether under any circumstances this court would compel a railroad company to elevate or depress its tracks," and later in the opinion the vice-chancellor states: "The bill, although primarily designed to enforce track elevation, is broad enough in its statements to warrant the giving of the relief indicated. There is a prayer, not only for depression or elevation of the tracks, but also for general relief."

The allegations of the bill succinctly stated are as follows: After setting out the charters or certificates of incorporation of the New York and Greenwood Lake Railroad Company, and its several predecessors, and the lease of the railroad company to the Erie Railroad Company, the bill alleges that there are two main tracks operated by the Erie Railroad Company, and also

four additional tracks, two of which are sidings, making a total of six tracks where the railroad crosses said avenue, which form a serious impediment to travel upon the highway, and that the defendants do not keep in repair good and sufficient bridges or passages over or under the railroad; that the crossing of the tracks as now laid out at grade of the said street is difficult and dangerous; that passenger and freight trains cross with great frequency at high rates of speed, and that travelers are frequently held up and detained at the crossing; that the crossing of the street is attended with great inconvenience and danger and that a different method of crossing which will be safe to the public is imperatively demanded. Section 29 of the General Railroad law (*P. L. 1903 p. 660*) is then set out, followed by the charge that it is the duty of the railroads to have the crossing by their trains made in such manner as not to impede the public travel, and that for this purpose the railroads should have some other crossing than the grade crossing, either by depressing or elevating the tracks or by making necessary changes in the grade of the street, and that as to the right of the public to use the highway and the right of the companies to operate their railroads across a public highway with safety, the court of chancery has power to regulate and direct the manner in which the crossing shall be effected. Then follows the prayer for relief, as above set forth.

These statements give scarcely an intimation of any other relief being sought than elevation or depression, and there is certainly no semblance of a claim that any of the tracks as laid are illegal structures and should be taken up or their use interfered with.

The answer of the railroad companies to the bill was confined to a denial that the tracks formed an impediment and to a denial of the non-repair of bridges over them, and that the defendants had not performed their duty in that regard. Their answer further extends to a denial of the power of the court to compel them to eliminate the crossing as a level crossing. The answer seems to cover the entire bill, and yet in no way touches the question of the illegality of the tracks at the crossing.

At the trial it was indeed remarked by the court that it was possible that an order might be made that if the defendants desired to maintain six tracks they must elevate them, but if willing to put four tracks somewhere else, the road might still be safe and convenient. This was merely by way of suggestion by the court and in any aspect seemed primarily dependent upon a consent of the companies to a change of location of some of the tracks to avoid the alternative of elevating six tracks. So during the whole hearing it seems not to have been intimated that an injunction would issue grounded upon the illegal character of the *de facto* crossing. Aside from the consideration that ordinarily an injunction cannot be granted under a prayer for general relief, but must be the subject of a special prayer (*African M. E. Church v. Conover*, 27 N. J. Eq. (12 C. E. Gr.) 161), and it may be incidentally remarked that here we have no special prayer for an injunction of the character of that granted by the decree, the familiar rule must govern that the relief afforded by the decree must conform to the case made out by the pleadings as well as the proofs, and that granted under the general prayer must be *secundum allegata et probata*. *Jordan v. Clark*, 16 N. J. Eq. (1 C. E. Gr.) 243; *Francis v. Bertrand*, 26 N. J. Eq. (11 C. E. Gr.) 213. "In order to entitle the plaintiff to a decree under the general prayer different from that specifically prayed, the allegations relied upon must not only be such as to afford a ground for the relief sought, but they must have been introduced into the bill for the purpose of showing a claim to relief, and not for the mere purpose of corroborating the plaintiff's right to the specific relief prayed; otherwise the court would take the defendant by surprise, which is contrary to its principles." 1 Dan. Ch. Pl. & Pr. 381.

The purpose of the statement in the bill that there were two main tracks and four additional tracks, seems to have been corroborative merely of the right to relief by means of elevation, by showing one of the elements of danger at the crossing. The statement did not have for its purpose a claim that any of such tracks were unwarranted by law.

The vice-chancellor alludes to this case as one of novel jurisdiction and the first suit of its kind ever brought in this state. It may be added that its importance is as great and far reaching as its novelty. In such a case it behooves us not to settle the important principles involved on grounds outside the issues, scantily supported by the proofs, and which at best seem to have been inadequately argued in the court below.

That part of the decree, therefore, appealed from by the railroad companies, must be reversed, because not within the scope of the bill but rested upon grounds not disclosed by the bill.

Here, again, it must be understood that no opinion is expressed as to the jurisdiction or power of the court to grant such relief upon a bill properly framed for that purpose.

The cause will be remitted to the court of chancery to the end that a decree be entered in accordance with the views above expressed.

No. 65. On appeal of the railroad companies—

*For affirmance*—MINTURN, VROOM—2.

*For reversal*—THE CHIEF-JUSTICE, GARRISON, SWAYZE, REED, TRENCHARD, PARKER, BERGEN, VOORHEES, BOGERT, GRAY, DILL, CONGDON—12.

No. 81. On appeal of the city—

*For affirmance*—THE CHIEF-JUSTICE, GARRISON, SWAYZE, REED, TRENCHARD, PARKER, BERGEN, VOORHEES, MINTURN, BOGERT, VROOM, GRAY, DILL, CONGDON—14.

*For reversal*—None.

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6 Buch.McCarter v. United N. J. R. R. & Canal Co.

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ROBERT H. McCARTER, attorney-general, ex rel. BOARD OF RAILROAD COMMISSIONERS, informant, respondent,

v.

THE UNITED NEW JERSEY RAILROAD AND CANAL COMPANY  
et al., defendants-appellants.

[Submitted July 3d, 1909. Decided November 15th, 1909.]

1. The specification of grounds of demurrer as prescribed by chancery rule 209 is, in effect, a statement in advance of the points of law intended to be argued thereunder.
2. A motion to strike out assigned causes of demurrer is unwarranted.
3. History of chancery rule 209.

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On appeal from a decree of the court of chancery advised by Vice-Chancellor Walker, whose opinion is reported in 75 *N. J. Eq.* (5 *Buch.*) 158.

*Mr. Nelson B. Gaskill*, assistant attorney-general, for the respondent.

*Mr. Alan H. Strong*, for the appellants.

The opinion of the court was delivered by

DILL, J.

The attorney-general filed an information on the relation of the board of railroad commissioners to compel the defendant company to abandon an existing crossing over its tracks at Irving street, in the city of Rahway, and to substitute some other method of crossing, to be determined by the court. The defendants filed a demurrer to the information, and, under the chancery rule 209, specified five causes for the demurrer. The attorney-general then moved to strike out the demurrer, and also



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McCarter v. United N. J. R. R. & Canal Co.76 Eq.

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to strike out each of the several causes. The vice-chancellor refused to strike out the demurrer. He also refused to strike out the first cause, but ordered that the second, third, fourth and fifth causes be stricken out. From this order the defendant company appeals.

If we were to decide this case upon the question argued before us, namely, the validity of the causes of demurrer stricken out by the order appealed from, we should arrive at a conclusion at variance with that of the learned vice-chancellor below; but there is another and prior question involved, and that is as to the practice adopted by the court below in striking out assigned grounds of demurrer.

The practice of requiring the statement of grounds for demurrer appears to have arisen as early as 1585. *Stat. 27 Eliz. ch. 5*. In 1654, the court of king's bench formulated in an order the substantial provisions of that statute, and later (1705) it was made more specific by 4 and 5 Anne ch. 16. In 1833, by *Reg. Gen. Hil. Term, 4 William IV.*, the practice of specifying causes or grounds was extended to every demurrer, and, what is to the point here, the party filing it was required to state in the margin thereof the matters of law intended to be argued thereunder. This order of 1833 was embodied in the Common Law Procedure act of 1852, which in turn was followed by the Judicature act of 1875, and order 28, rule 2, of that act is the source of our chancery rule 209.

As was said by Vice-Chancellor Van Fleet in 1889:

"The new orders in chancery of England contain a clause identical in purpose with our rule. Rule 2d of order 28 requires that a demurrer shall state the specific ground on which it is founded; our rule requires that the particular ground shall be stated; so that it is manifest from their language that the scope and design of both are the same." *Essex Paper Co. v. Greacen*, 45 N. J. Eq. (18 Stew.) 504 (at p. 505).

Chancery rule 209 requires the grounds of demurrer to be specified, and these grounds, one or more, are in effect mere announcements in advance of the questions of law intended to be argued. The origin of this requirement is found in *Reg. Gen. Hil. Term, 4 William IV.*, where the party filing the de-

6 Buch.

McCarter v. United N. J. R. R. &amp; Canal Co.

murrer was required to state in the margin thereof the points of law intended to be argued thereunder.

The reason for requiring a statement of the points of law upon which the demurrant relies is apparent. The adverse party is thus advised at what point his pleading will be attacked, and the court, in passing upon the demurrer, is aided by specific reference to the grounds in support thereof. *Essex Paper Co. v. Greacen*, *supra* (at p. 506).

There is, however, nothing in the statute, in the rules of the court or in the history of the law, and there is no precedent to be found, which would warrant the striking out of the causes specified. The demurrer may be stricken out if it is sham or frivolous, but not the causes.

A motion to strike out one or more assigned causes of demurrer, viz., the statement of the points of law intended to be argued in support of the demurrer, is asking the court in advance of the regular trial of the issues of law to hear the case in piecemeal and to limit the scope of the argument upon the trial by eliminating in advance the discussion upon certain points of law. This the court may not do.

A demurrer is wholly good or wholly bad, and it is not necessary that all of the causes of demurrer specified should hold good. If any of the assigned grounds are valid the demurrer should be sustained.

To sanction motions to strike out, either wholly or in part, assigned grounds of demurrer would prolong litigation indefinitely. Such practice should not be allowed.

For this reason, therefore, the order appealed from should be reversed.

*For affirmance*—None.

*For reversal*—THE CHIEF-JUSTICE, GARRISON, SWAYZE, REED, TRENCHARD, PARKER, BERGEN, MINTURN, BOGERT, VREDENBURGH, VROOM, GRAY, DILL, CONGDON—14.

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Clark v. Board of Education of Bayonne.

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76 Eq.

JOHN P. CLARK and THOMAS M. O'BRIEN, complainants-  
appellees,

v.

THE BOARD OF EDUCATION OF THE CITY OF BAYONNE,  
defendant-appellant.

[Argued June 24th, 1909. Decided November 15th, 1909.]

1. The court of chancery has no jurisdiction to interfere with a judgment of a court of law except where some well defined independent equitable ground exists for restraining the enforcement thereof.

2. That an unsuccessful litigant in a court of law has appealed therefrom and is meanwhile unable to secure from any law court a restraint against further proceedings under the judgment below, is not an independent equity which gives the court of chancery jurisdiction to interfere, although such proceedings under the judgment may result in such a change in the status of the subject-matter of the controversy as may make nugatory a judgment of the court of review when pronounced. Overruling *People's Traction Co. v. Central Passenger Railway Co.*, 67 N. J. Eq. (1 Robb.) 370.

3. An application for a stay is a mere step in procedure to be applied in the exercise of an equitable discretion by the court having control of the law action and by that court only.

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On appeal from two orders of the court of chancery advised by Vice-Chancellor Garrison.

The board of education of the city of Bayonne had taken preliminary steps for the erection of a school building. The contract was about to be awarded when the complainants, taxpayers of Bayonne, applied to a justice of the supreme court for a writ of *certiorari* to test the legality of the proceedings of the board. The rule was granted with a stay, testimony taken, the proceedings affirmed and judgment entered in the supreme court affirming the proceedings and dismissing the writ.

A writ of error was sued out in this court, removing said judgment here. The prosecutors then filed a bill in chancery,

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6 Buch.Clark v. Board of Education of Bayonne.

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reciting the proceedings at law, alleging that the judgment was erroneous, that the board was about to prosecute the work by entering into a contract for the school building, and that the court of errors and appeals was not then in session, and hence no application could be made to that court for a stay, and prayed for an injunction restraining the board of education from entering into the contract until the determination of the writ of error in this court.

A rule to show cause was issued by the vice-chancellor, with an *interim* restraining order, and on its return it was made absolute by a decree reciting that in the proceedings in the supreme court on *certiorari* judgment was entered against the complainants herein (the prosecutors therein), from which a writ of error was promptly taken out and was being regularly pursued, and that, under the circumstances, it was proper for the court of chancery to maintain the *status quo* until the complainants should have proper opportunity to make application to the court of errors and appeals for a stay pending the argument upon and determination of the writ of error.

The defendant-appellant herein, having perfected an appeal from the court of chancery to this court, an application was made by the complainants-respondents for a stay against proceedings under the supreme court judgment, which stay this court refused. Thereafter the complainants secured an order in the court of chancery dismissing the bill in that court.

*Mr. J. Merritt Lane*, for the complainants-appellees.

*Mr. Elmer W. Demarest*, for the defendant-appellant.

Upon the case as stated above, the opinion of the court was delivered by

DILL, J.

The dismissal by the court of chancery does not, as the respondent argues, affect the appellant's right to proceed in this court, and accordingly this appeal brings up for review two chancery orders; the first denying the motion of the defendant

herein to dismiss the bill of complaint on the grounds of absence of jurisdiction, want of equity and the insufficiency of the bill; the second restraining the defendant herein from proceeding under the judgment in the supreme court pending an application to this court for stay.

The question is squarely presented as to whether a court of chancery has jurisdiction to interfere in proceedings in a court of law where the case is one within the jurisdiction of that court and where no independent equity is shown except the claim that the complainant is in good faith seeking to review the judgment of the court of law and has been unable to secure from any law court a stay pending the appeal.

The learned vice-chancellor below was constrained to follow the only equity precedent in this state, where another vice-chancellor allowed an injunction under similar circumstances in order to preserve the *status quo* of the litigation until the appeal could be heard. *People's Traction Co. v. Central Passenger Railway Co.*, 67 N. J. Eq. (1 Robb.) 370.

That case we decline to approve and overrule it as unsound.

In the *People's Traction Company Case* the court rested upon *Hart v. Albany*, 3 Paige 381; but *Hart v. Albany* does not sustain any such doctrine, for there the original bill was filed in chancery and the injunction staying proceedings issued out of the same court.

The control of a court over its own process is not questioned; but it is quite another proposition to say that a court of chancery may issue a stay in a law action pending an appeal from the decision of the law court to a court of last resort. The question as to the stay and the applicant's right thereto, which is erroneously declared in the *People's Traction Company Case* to constitute an independent equity, on the contrary involves but a mere step in procedure in the law action, to be applied in the exercise of an equitable jurisdiction in that court and not in the court of equity.

The court of chancery has no jurisdiction to interfere with a judgment of the supreme court except where some well-defined independent equitable ground exists for restraining the enforcement thereof.

That an unsuccessful litigant in a court of law has appealed therefrom and is unable meanwhile to secure from any law court a restraint against further proceedings under the judgment below, is not, as declared in *People's Traction Co. v. Central Passenger Railway Co.*, *supra*, an independent equity which gives the court of chancery jurisdiction to interfere, although such proceedings under the judgment may result in such a change in the status of the subject-matter of the controversy as may make nugatory the judgment of the court of review when pronounced.

This rule dates back to the early days of courts of chancery in England (*Montague v. Dudman*, 2 Ves. 396, decided in 1751), is restated in the English Judicature act of 1875, and is sustained by a long line of authoritative decisions as against which the *People's Traction Co. v. Central Passenger Railway Co.*, *supra*, stands out as the only decision to the contrary. 2 Dan. Ch. Pr. (6th Am. ed.) 1624; Pom. Eq. Jur. § 1365.

The court of chancery in this state follows the practice of the English courts of chancery as stated in *Southern National Bank v. Darling*, 49 N. J. Eq. (4 Dick.) 398, and *Jones v. Davenport*, 45 N. J. Eq. (18 Stew.) 77. Similarly this court follows the practice of the house of lords of England, as held in *Newark and New York Railroad Co. v. Mayor and Common Council of the City of Newark*, 23 N. J. Eq. (3 C. E. Gr.) 515 (at p. 517).

Under the English decisions the rule of non-interference of equity with law is so well recognized that it has been rarely questioned (*Mayor of Gloucester v. Wood*, 3 Hare 153), and an application similar to the one before us was characterized by Mr. Lord Justice James as a very bold application to induce the court to repeal settled law. *Garbutt v. Fawcus*, 33 L. T. R. 617.

Courts of equity as such have no revising, controlling or superintending power over the judgments, proceedings or decisions of courts of law. *Hood v. N. Y. & N. H. R. Co.*, 23 Conn. 609; *Crim v. Handley*, 94 U. S. 652.

In this state in 1844 the court of chancery, after reviewing the American and English decisions, declared for the same doc-

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trine. *Executors of Powers v. Administrator of Butler*, 4 N. J. Eq. (3 Gr. Ch.) 465.

Equity interferes with judgments at law only where there has been fraud, or mistake, or accident, in procuring the judgment and where the legal remedies are inadequate.

To hold that a court of chancery may grant a stay, as in this case, in legal proceedings, when a court of law, which has all the facts before it, and which has exclusive jurisdiction of the action, has decided the question on its merits, is to hold that a court of equity may set up its judgment in opposition to the judgment of the law court and may virtually take unto itself jurisdiction of a cause over which it had originally no jurisdiction. Such a position is obviously unsound and inconsistent with the history and established principles of equity jurisprudence, and results, as here, in an attempted usurpation of the jurisdiction of the supreme court and of even this court by the court of chancery.

Counsel for both appellant and respondent have assumed that the writ of error to this court did not act as a stay, and therefore we have not considered that question.

The orders appealed from are both reversed.

*For affirmance*—None.

*For reversal*—THE CHIEF-JUSTICE, GARRISON, SWAYZE, REED, TRENCHARD, PARKER, BERGEN, VOORHEES, MINTURN, BOGERT, VREDENBURGH, VROOM, GRAY, DILL, CONGDON—15.

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6 Buch.Frothingham's Case.

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In the matter of the probate of the will of HOWARD P. FROTHINGHAM, deceased.

[Submitted June 24th, 1909. Decided November 15th, 1909.]

Lead pencil marks drawn by a testator through certain clauses of his will, with the intent *at the time* to revoke such clauses, will have that effect given to them notwithstanding the subsequent employment of the instrument so canceled as the text from which a fair copy was to be made.

On appeal from a decree of the prerogative court advised by the vice-ordinary, whose opinion is reported in 75 *N. J. Eq.* (5 *Buch.*) 205.

The orphans court of Monmouth county, in admitting to probate the will of Howard P. Frothingham, deceased, filed the following conclusions:

The writing, which it is the object of these proceedings to have admitted to probate as the last will and testament of Howard P. Frothingham, was executed by him as his will in due form of law on the 10th day of October, 1906. This is proved by the testimony of the subscribing witnesses to the instrument.

After the death of the testator on February 2d, 1907, the paper in question was found in his safe, in his New York office, with pencil marks through five of the eleven items it contained; and the proponent, his widow, now asks to have the will probated with the canceled parts omitted.

It appears by the proofs that testator, at the time of the execution of the instrument in October, 1906, was engaged in business as a money broker in the city of New York; in the latter part of December, 1906, about two months prior to his death, he had a conversation with Mr. James P. Dodd, his confidential employe, and they talked over his financial conditions; he had lost most of his personal property since the execution of the will in October; he said that he had almost no estate left, outside of what real estate he had, and that he thought he ought



to change his will, because he had provided in the will for annuities, and there was no money out of which to pay annuities, and that he was worried about what would become of Mrs. Frothingham. He wanted her to have all she could get out of his estate, which he thought would be very little, and he told Mr. Dodd to call his attention to the matter the next day, so he could get the will out of the safe and make the changes. The next day he asked Mr. Dodd for the will, and then he made the pencil marks now appearing upon it (including the word "sold" written in pencil across the second paragraph of the fifth item), with the exception of the pencil marks through the names James P. Dodd, John Olney and John J. Edwards, in the second paragraph of the third item of the will; these marks were made by Mr. Dodd at the same time at the suggestion and in the presence of the testator.

After making these pencil marks upon the will, Mr. Dodd asked him if he wanted it sent to his lawyer; testator said, "No, send it to the man who engrossed the will and have him make a draft of it, according to the corrections." The draft was made, but one clause in it did not suit the testator, "and he threw it aside and put the old will in the safe." He put the draft of the new will in his desk. This new draft was found in his desk, after his death, unexecuted, and with a pencil line drawn through the first page of it.

From an inspection of the will, it appears that the second item, across which testator made pencil marks, provided for the payment of annuities amounting to \$6,000 yearly, and made the same a charge upon his residuary estate, which he devised to his wife.

By the third item, through which he had drawn pencil lines, he gave his business to his friend, James P. Dodd, and by the fourth and fifth items, through which he had also drawn pencil marks, and across the second paragraph of the fifth item had written the word "sold," he devised certain real estate in East Orange, New York City, and in Passaic and Bergen counties in this state.

Although not in proof, it was stated by counsel at the hearing that all the real estate devised by these items had been sold

by the testator prior to making the pencil marks in December. With the items thus marked in pencil eliminated, the will simply provides for the payment of testator's debts, names his wife his executrix, and bequeaths and devises to her all his real estate and personal property.

It was conceded on the argument, that under *Gen. Stat. p. 3757 § 2*, and on the authority of *In re Kirkpatrick's Will*, 22 N. J. Eq. (7 C. E. Gr.) 463, and the recent case of *Hilyard v. Wood et al.*, 71 N. J. Eq. (1 Buch.) 214, a will, or any devise or bequest in it, can be revoked by canceling the same by the testator himself, or in his presence, and by his direction or consent, and that the canceling can be done with a lead pencil as effectively as if done in ink, providing the canceling was done with intent to revoke the clause canceled.

The only question for determination in this matter is that of the testator's intention in making the pencil marks upon the will.

It is contended, on the part of the proponent, that testator thereby intended to revoke the clauses of the will in question, by canceling the same with the pencil marks, and that this was his intent at the time of making the marks, and that only that portion of the will should be admitted to probate the clauses of which have not been canceled by such marks.

The caveators claim that testator's act in making these pencil marks was not final, but that the marks were only placed upon the will as directions or instructions for the draftsman, in preparing a new will, which should eliminate the clauses marked, and which testator intended to execute, in order to give effect to the changes which he desired to make in the disposition of his estate, and they invoked the application of the rule of dependent relative revocation on the facts established.

Under the proof I do not think this rule applies. There is nothing in the testator's declarations showing that the cancellation of the clauses in question was conditional, and not final. He realized that he had sustained great losses since the execution of his will, and because of them he desired to change his will. He had provided for annuities, and realized that his estate could not produce the money to pay them. He was natu-

rally worried about what would become of his wife, in the event of his death, in his then present financial condition, and, as he expressed it the day before the cancellation of the clauses,

"he wanted her to have all she could get out of the estate, which he thought would be very little, and he wanted his attention called to the matter the next day, so he could get the will out of the safe and make the changes."

The next day, without being reminded of the matter, he called for the will and made the changes he desired, by canceling the clauses in question, and, in effect, leaving everything to his wife. He made no statement about executing a new will, or that would show any intention on his part to have these changes in his will become effective, only on the happening of some other event such as the execution of another will, and did direct the will, after the cancellation of these clauses, to be taken to the draftsman to have a draft made of it, omitting the canceled items; but there is nothing in the proofs but this act to indicate, in any way, an intention on the part of the testator to execute a new will, or to postpone giving effect to the changes made in his will until a new will could be prepared and executed.

He apparently had no doubt that the will in its canceled form was effective; he did not consider the advice of counsel on it necessary. When the new draft of will was presented to him he was not satisfied with it. He did not execute it, but placed it in his desk, and put his will with the canceled clauses in his safe, and kept it there without change until he died. He treated the cancellation of the clauses in question as a completed and final act, and clearly regarded it as in proper form to give effect to his express desires concerning the welfare of his wife. I can find nothing in the proof showing the act of cancellation to be dependent on any other act of the testator, or that it was related in any way to an intent on his part to make the same effective only when some more formal method of revocation had been adopted by him.

In the light of his declarations before the cancellations, and of his avowed purpose and reasons for making them, coupled

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6 Buch.Frothingham's Case.

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with his treatment of the new draft of the will, when it was received, and for nearly two months thereafter, I am satisfied that at the time testator made the lead pencil marks through the clauses of his will, he made them with the intent at that time of revoking such clauses by cancellation, and that his act in then making the cancellations was final, and not deliberative or conditional on any other intention or act on his part.

My conclusion is that the cancellations were made *animo revocandi*, and the will will be admitted to probate with the canceled parts omitted.

The decree of the orphans court upon appeal to the prerogative court was reversed for reasons that appear in the opinion of the vice-ordinary. The present appeal is from this decree of the prerogative court.

*Mr. Edmund Wilson*, for the appellants.

*Messrs. McDermott & Fisk*, for the respondents.

PER CURIAM.

We have reached the conclusion that the decree of the orphans court was right, and should be affirmed for the reasons stated in the opinion filed by Judge Foster in that court, and that to this end the decree of the prerogative court should be reversed.

Our examination of the testimony convinces us of the correctness of the conclusions reached by the orphans court, viz., that *at the time* the testator made the erasures his sole object was to get rid of the clauses that he so canceled, and that the having of a fair copy made by a penman, and whatever grew out of it, were after thoughts to which controlling significance did not attach. What we wish to emphasize is that in revocations of this nature, there is but one point of time as to which the intent of the testator is to have controlling effect, and that is the time of the doing of the very act that constitutes such revocation. To extend the scope of such inquiry to subsequent periods, however closely related in point of time with the revocatory

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State Mutual B. & L. Ass'n v. Millville Imp. Co.76 Eq.

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act, is but to add a new danger to a rule that is already from its inherent nature too much exposed to fraud.

The decree of the prerogative court is reversed, and the decree of the Monmouth county orphans court affirmed.

*For affirmance*—THE CHIEF-JUSTICE, REED, TRENCHARD, VOORHEES, MINTURN, VROOM—6.

*For reversal*—GARRISON, PARKER, BERGEN, VREDENBURGH, GRAY, DILL, CONGDON—7.

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STATE MUTUAL BUILDING AND LOAN ASSOCIATION OF NEW JERSEY, complainant-respondent,

v.

MILLVILLE IMPROVEMENT COMPANY et al., defendants-appellants.

[Argued June 23d, 1909. Decided November 15th, 1909.]

On appeal from a decree of the court of chancery advised by Vice-Chancellor Walker, whose opinion is reported in 74 N. J. Eq. (4 Buch.) 721.

*Mr. F. Morse Archer*, for the appellants.

*Mr. Solomon S. Iszard*, for the respondent.

PER CURIAM.

The decree appealed from is affirmed, for the reasons stated in the opinion filed in the court below by Vice-Chancellor Walker.

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6 Buch.Tingley v. International Dynelectron Co.

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*For affirmance*—THE CHIEF-JUSTICE, GARRISON, SWAYZE, REED, TRENCHARD, PARKER, BERGEN, VOORHEES, MINTURN, BOGERT, VREDENBURGH, GRAY, DILL, CONGDON—14.

*For reversal*—None.

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STEPHEN L. TINGLEY, appellant,

v.

INTERNATIONAL DYNELECTRON COMPANY et al., respondents.

[Argued June 24th, 1909. Decided November 15th, 1909.]

On appeal from a decree of the court of chancery advised by Vice-Chancellor Emery, whose opinion is reported in 74 N. J. Eq. (4 Buch.) 538.

*Mr. Frank E. Bradner*, for the appellant.

*Mr. Elwood C. Harris*, for the respondents.

PER CURIAM.

The decree appealed from is affirmed, for the reasons stated in the opinion delivered in the court below by Vice-Chancellor Emery.

*For affirmance*—THE CHIEF-JUSTICE, GARRISON, SWAYZE, REED, TRENCHARD, PARKER, BERGEN, VOORHEES, MINTURN, BOGERT, VREDENBURGH, VROOM, GRAY, DILL, CONGDON—15.

*For reversal*—None.

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Ferry Hallock Co. v. Progressive Paper Box Co.

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76 Eq.

FERRY HALLOCK COMPANY, complainants-respondents,

v.

PROGRESSIVE PAPER BOX COMPANY, defendants-appellants.

[Argued June 24th, 1909. Decided November 15th, 1909.]

On appeal from a decree of the court of chancery advised by Vice-Chancellor Emery.

*Messrs. Howe & Davis*, for the complainants-respondents.

*Mr. Philip J. Schotland*, for the defendants-appellants.

PER CURIAM.

The decree appealed from is affirmed, for the reasons stated in the opinion delivered in the court below by Vice-Chancellor Emery.

*For affirmance*—THE CHIEF-JUSTICE, GARRISON, SWAYZE, REED, TRENCHARD, PARKER, BERGEN, VOORHEES, MINTURN, BOGERT, VREDENBURGH, VROOM, GRAY, DILL, CONGDON—15.

*For reversal*—None.

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6 Buch.Swift v. Craighead.

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MARY L. SWIFT, complainant-appellee,

v.

ROBERT D. CRAIGHEAD, JR., individually and as executor of Mary  
A. Sloan, deceased, defendant-appellant.

[Argued July 1st, 1909. Decided November 15th, 1909.]

On appeal from an order of the court of chancery advised by  
Vice-Chancellor Leaming.*Mr. Richard V. Lindabury*, for the appellant.*Messrs. Bleakly & Stockwell*, for the respondent.

PER CURIAM.

The order appealed from is affirmed, for the reasons stated in  
the opinion delivered in the court below by Vice-Chancellor  
Leaming.*For affirmance*—THE CHIEF-JUSTICE, GARRISON, REED, TREN-  
CHARD, BERGEN, VOORHEES, MINTURN, BOGERT, VREDENBURGH,  
VROOM, GRAY, CONGDON—12.*For reversal*—SWAYZE, PARKER—2.



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Hattie v. Gehin.

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76 *Eq.*

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ROBERT M. HATTIE et al., complainants and appellants,

v.

GUSTAVE W. GEHIN, defendant and respondent.

[Submitted July 3d, 1909. Decided November 15th, 1909.]

On appeal from an order of the court of chancery advised by Vice-Chancellor Howell.

*Messrs. Edward A. & William T. Day*, for the appellants.

*Messrs. Barrett & Barrett*, for the respondent.

PER CURIAM.

The order appealed from is affirmed, for the reasons stated in the opinion delivered in the court below by Vice-Chancellor Howell.

*For affirmance*—THE CHIEF-JUSTICE, GARRISON, SWAYZE, REED, TRENCHARD, PARKER, BERGEN, VOORHEES, MINTURN, BOGERT, VREDENBURGH, VROOM, GRAY, DILL, CONGDON—15.

*For reversal*—None.

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6 Buck.Wagner v. Deegan.

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IDA WAGNER, appellant,

v.

PHILIP J. DEEGAN et al., respondents.

[Argued June 24th, 1909. Decided November 15th, 1909.]

On appeal from a decree of the court of chancery.

*Mr. J. M. Archer* and *Mr. Frederick A. Rex*, for the respondents.*Mr. Joseph Kaighn*, for the appellant.

Affirmed.

*For affirmance*—THE CHIEF-JUSTICE, GARRISON, SWAYZE, REED, PARKER, BERGEN, VOORHEES, MINTURN, BOGERT, VREDDENBURGH, VROOM, GRAY, DILL, CONGDON—14.*For reversal*—None.

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Collins v. Garrigues.

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76 Eq.

IDA E. COLLINS et al., defendants-appellants,

v.

WILLIAM A. GARRIGUES, complainant-respondent.

[Argued June 25th, 1909. Decided November 15th, 1909.]

On appeal from a decree of the court of chancery.

*Mr. Timothy J. Middleton*, for the appellants.

*Mr. George B. Evans* and *Mr. Solomon S. Iszard*, for the respondent.

Affirmed.

*For affirmance*—THE CHIEF-JUSTICE, GARRISON, SWAYZE, REED, TRENCHARD, PARKER, BERGEN, VOORHEES, MINTURN, BOGERT, VREDENBURGH, GRAY, DILL, CONGDON—14.

*For reversal*—None.

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5 *Buch.*Lloyd v. Pennsylvania Electric Vehicle Co.

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\*HERBERT LLOYD et al.

v.

PENNSYLVANIA ELECTRIC VEHICLE COMPANY.

[Argued December 3d and 4th, 1908. Decided March 1st, 1909.]

GARRISON, J. (dissenting).

My vote in this case is determined by two fundamental rules for the construction of statutes, *first*, that effect be given to all of the language of each section of the act that is under construction, and *second*, that the re-enactment of a section after a certain force and effect has been placed upon it by judicial construction amounts to a legislative declaration that such is its intended force and effect. I perceive no reason why these elemental rules should not be applied to the construction of sections 18 and 86 of the Revised Corporation act of 1898, which is the matter presented for determination upon this appeal; if applied the two sections may be harmonized.

Section 86 of the act in question is a re-enactment of section 80 of the act of 1875 after a judicial construction had been placed upon it. This construction was that the provision of section 80 as to distribution of surplus upon dissolution was "a legislative declaration of what are the rights of the holders of preferred stock when the law or contract under which the stock is issued does not in any way limit or restrict them." *McGregor v. Home Insurance Co.*, 33 N. J. Eq. (6 Stew.) 181.

As the statute law then stood such legislative provision was one that incorporators were apparently without power to escape. Such power is now, however, expressly conferred by section 18 of the revised act of 1898 by a new provision that authorizes the creation of stock with such preferences "as shall be stated and expressed in the certificate of incorporation." Hence if incorporators do not desire that such legislative provision as to

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\* Omitted from its proper place in 75 N. J. Eq. (5 Buch.) 263.—REP.

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the rights of stockholders upon dissolution (contained in the eighty-sixth section) should be read into their charter-contract all that they have to do is to "state and express in their certificate of incorporation" whatever provision touching the matter they desire to substitute therefor. The power to do this is given in section 18 and the mode of its accomplishment is specifically laid down. It is only when incorporators do not avail themselves of the power thus conferred by section 18 that the legislative provision of section 86 determines the matter as theretofore. Thus the previously construed provision of section 86 and the new provision of section 18 are harmonized consistently with their joint enactment; incorporators having under the new provision of section 18 untrammelled power to define the relative rights of their stockholders upon dissolution provided they do so in the manner specifically pointed out in such section, while the re-enacted legislative provision of section 86 is left in unimpaired force whenever incorporators do not avail themselves of the power conferred upon them by section 18. Thus effect is given to the language of each section without the interpolation of language that is to be found in neither.

The contention of the appellants on the other hand does violence to both of these fundamental rules. The construction for which they contend would interpolate into section 18 after the word "preferences" the word "only," making it read "such preferences *only* as shall be stated and expressed," whereas the legislative language is that stock shall have "such preferences as *shall* be stated and expressed." The effect is to alter section 18 diametrically, creating thereby an irreconcilable conflict between such section and section 86, where before none existed. For as the two sections left the hands of the lawmaker the legislative provision of section 86 was a part of every charter-contract where no different provision was "stated and expressed" in the certificate, whereas after such interpolation such legislative provision was null and void unless "stated and expressed" in the certificate. This is legislation, not construction. Moreover, as construction seeks to avoid discord, not to create it, it is entirely alien to its function to insert in an act words that render the harmonizing of its several sections impossible.

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Because of the irreconcilable conflict thus gratuitously created the appellants strip section 86 not only of its judicially established force but of all force whatsoever by making it effective only when it had become ineffectual. For the proposition is that the provision of section 86 is to be given effect only when a like provision has been declared by the incorporators and "stated and expressed" in their certificate of incorporation, in which case of course section 86 is entirely unnecessary and of no effect at all. If this had been the intention of the legislature it is too plain for argument that it would not have re-enacted the judicially construed provision of section 86.

The net result therefore of departing from the elemental rule of giving to the language of the legislature is to legislate into section 18 a provision that is not therein and to legislate out of section 86 a provision that was re-enacted by the legislature in view of its established construction. I cannot agree with the appellants that this is the proper way to deal with legislative language.

In the present case the certificate of incorporation after showing that preferred stock has been created "states and expresses" the rights of such stock while the company is a going, dividend declaring concern, but omits to "state and express" what such rights shall be upon dissolution, which is the very matter expressly provided for by the legislature itself in section 86. Hence under elemental principles such legislative provision is to be read into the charter-contract just as it was in *McGregor v. Home Insurance Co.*, which case, in view of the creation of preferred stock by the defendant in the present case, is in no respect distinguishable from it. This was the conclusion reached in the court below by Vice-Chancellor Leaming, with whose views I am in entire accord. I am requested by Justices Reed, Trenchard and Voorhees to say that they concur in the views expressed in the foregoing memorandum.



CASES  
ADJUDGED IN  
THE COURT OF CHANCERY  
OF  
THE STATE OF NEW JERSEY.

OCTOBER TERM, 1909.

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MAHLON PITNEY, CHANCELLOR.

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JOHN R. EMERY, FREDERIC W. STEVENS, EUGENE STEVENSON,  
LINDLEY M. GARRISON, EDMUND B. LEAMING, JAMES E.  
HOWELL AND EDWIN R. WALKER, VICE-CHANCELLORS.

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EDWARD S. CAMPBELL, receiver of the Middlesex County Bank,

v.

THE PERTH AMBOY MUTUAL LOAN, HOMESTEAD AND BUILDING  
ASSOCIATION.

[Decided October 20th, 1909.]

1. A party in an action at law who accepts the decision of the supreme court that his remedy is in equity, instead of taking the opinion of the court of errors and appeals thereon, makes the decision the law of the



case, and his right to sue in equity is not defeated by a subsequent decision of the court of errors and appeals in a similar case establishing the rule that the remedy is at law, though the decision may control as to the amount of the recovery.

2. Where an assignment of shares in a building association was made to a bank as collateral before the termination of the charter of the bank, and it continued to transact business as a corporation under the theory that its charter was extended by *1 Gen. Stat. 1895 p. 972*, as construed by the banking and insurance department, the assignment should not be declared invalid because of a supposed legal non-existence of the corporation during the loans secured by the assignment.

3. Notice to the treasurer of a building association of an assignment of shares to a bank of which he was cashier as collateral for a loan is not notice to the association of the assignment, where the treasurer and cashier contemplated in procuring a certificate for matured shares on maturity of the shares a fraud on the bank, and his knowledge of the bank's rights will not be imputed to the association.

4. A building association issuing matured shares in payment of shares which had matured fixes the rights of the shareholder in the distribution of the assets in which he is entitled to share.

5. The books of a corporation are for many purposes the primary evidence of membership as between the corporation and the members, and in the payment of dividends without notice of an adverse claim a corporation is protected by payment to the holder of record on its books.

6. As between a building association and its members, a payment on the final distribution of assets to the shareholder of record without notice of a previous assignment is a valid payment as against a holder of the certificate by assignment who has not applied for a transfer on the books.

7. Where a building association paid shares on their maturity by issuing a non-negotiable certificate of indebtedness to a third person personally, and the association knew of the assignment of the shares to him, the issue of the certificate was as between the association and the shareholder or those claiming under him an issue to the third person as assignee, and the certificate was subject in the hands of any holder to the defence that it was procured by the third person's fraudulent suppression of a previous assignment of the original shares. so that on notice to the association of such previous assignment, a payment of the matured certificate was at its own peril.

8. The right of a bank holding as assignee to secure a loan stock in a building association is entitled to share on distribution on the maturity of the shares, and it may then demand the amount coming to its assignor, and the time fixed for the accrual of its cause of action against the association is not affected by the fact that the association, without knowledge of the assignment, issued matured certificates on the maturity of the shares at the option of the assignor.

9. The statute of limitations is not applicable to an equitable interest in a fund held in trust by a building association for distribution among the holders of shares in a matured series.

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10. Stock in a building association was assigned to a bank as collateral. The association had no notice of the assignment, and, on the maturity of the shares, it paid them by issuing a certificate of indebtedness to a third person individually, who was to the knowledge of the association an assignee of the original holder. The third person pledged the certificate, and the pledgee recovered in a suit from the association. The bank and its receiver delayed notice of any claim under the assignment until nearly six years after the maturity of the shares, and until after the certificate of indebtedness had been, with the consent of the receiver, sold to the pledgee for the payment of his debt. The pledgee was a *bona fide* pledgee.—*Held*, that the right of the bank to recover from the association on the original shares was barred by laches.

11. A payment by a building association to the original holder of shares of the amount due, made with notice of a third person's claim, under an assignment of the shares from the owner, is at the risk of the association, and the assignee may recover from the association the amount due on the shares on their maturity.

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Heard on bill, answer, replication and proofs.

*Mr. Sherrerd A. Depue*, for the complainant (*Messrs. Lindabury, Depue & Faulks*, solicitors).

*Mr. Alan H. Strong*, for the defendant.

EMERY, V. C.

The substantial case disclosed by the pleadings and proofs in this case is as follows: On August 27th, 1891, one Louis Briegs, being then the owner of ten shares, Series "A," of the stock of the defendant, a building and loan association, assigned these shares to the Middlesex County Bank as collateral for a loan obtained from the bank. On the same date Rosa Briegs, his wife, assigned also to the bank five shares of stock in the same series, of which she was the owner, and as collateral for her loans or those of her husband. The constitution of the association provided that "certificates of stock may be transferred in person or by attorney in presence of the secretary, and shall be recorded in the books of the association." The assignments to the bank authorized the transfer by the secretary on the books, but no transfer was made. The certificates for the shares, together with the assignments to the bank, were originally in the possession and control of George M. Valentine, the cashier of the bank, and so continued until the

failure of the bank in 1899, when they came to the possession of complainant as receiver of the bank, together with the notes for which they were collateral. The shares were duly sold by the receiver to pay the loans, were purchased by him at the sale, and assignments of the shares were also made to the receiver by Louis Briegs and Rosa Briegs in February, 1901. On March 8th, 1901, notice of the assignments and of the receiver's title or claim to the shares was given to the building and loan association. In the meantime, and subsequent to the pledging of the shares as collateral to the bank in 1891, the status of the Briegs to the building and loan association, in reference to the shares, was as follows: The dues on the shares were regularly paid, the dues on both sets of shares, and also other shares, being paid by Louis Briegs's own check. The association had several shares or series maturing at successive years, and under its charter and by-laws the board of directors on or about July 1st, 1896, declared the shares in Series "A" matured. By virtue of this declaration the Briegs, not being borrowers of the association, were entitled under the charter and by-laws to receive \$200 for each share. Shortly before July 1st, 1896, Valentine, the cashier of the bank (who held in his possession as cashier the certificates and the assignments to the bank), became also treasurer of the building and loan association, and he had also in May, 1896, become the assignee, under the Assignment act, of Louis Briegs, for the benefit of the latter's creditors. The shares of stock were not specially mentioned in the deed of assignment, but under the statute (*1 Gen. Stat. p. 78 § 2*) the title of Louis Briegs, subject to the loan, passed to his assignee, Valentine, who had the actual possession of the shares for the bank. The building and loan association, instead of paying off at once the matured shares, issued certificates of matured shares of the par value of the original shares, payable at a future period, January 1st, 1907, with interest until paid. These certificates for matured shares were usually or regularly issued on the surrender of the original shares, where certificates had been issued, and were signed by Valentine as treasurer as well as by the president and secretary of the association. Valentine procured the issue to himself and in his own name of a certificate for the ten matured

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shares to which Louis Briegs, as owner of the original shares on the record or books of the association, was entitled. This certificate for matured shares, dated July 1st, 1896, was delivered to him about October 30th, 1896, and by him deposited with another bank (the First National Bank of South Amboy) as collateral security upon a loan to himself. Up to the time of the delivery of this certificate and the deposit no notice had been given by the Middlesex County Bank to the association of the assignment of any of the Briegs shares to it as collateral, nor does it appear that any of the officers of the association (except Valentine himself) had notice of the assignment to the bank of any of the Briegs shares. They did, however, have notice of Briegs's assignment to Valentine, and the secretary of the association says that the certificate of matured shares for the ten shares of Louis Briegs was, as he understood it at the time, given to Valentine, as claiming it as assignee, although not so described in the certificate. The certificate for the Louis Briegs matured shares issued to Valentine continued in the possession of the South Amboy Bank until after the failure and insolvency of the Middlesex County Bank in 1899, and as collateral to Valentine's original personal notes renewed from time to time. In January, 1901, the association paid the amount due on these shares to the Amboy bank after suit brought. As to the Rosa Briegs five shares in Series "A" no certificate of matured shares appears to have been given, but on February 20th, 1897, Valentine, claiming (without any right or authority so far as appears by the proofs) that these original shares, although standing in Rosa Briegs's name, really belonged to the creditors of her husband, and passed under the assignment to him as assignee, received from the association, by check to himself personally, payment of one of the matured shares of Rosa Briegs. For the other four shares no certificate of matured shares was issued, and no payment made on their account until August, 1902, when a sum equal to the amount then due, with interest on these four shares, was paid to Rosa Briegs herself, upon her giving indemnity. This payment was made more than a year after notice of the complainant's claims to the money due on the shares, and also after a suit at law brought by complainant as receiver

against the association to recover the amounts due on both the Louis and Rosa Briegs shares. The Briegs now say that this payment was made on account of the amount due Rosa Briegs on her five shares in another series, "F," and not for the four matured shares of Series "A," and that these have never been paid. The association claims that the payment was for the Series "A" shares. So far as relates to complainant's claim to the amount due on these shares the dispute is immaterial, because the payment to Rosa Briegs after notice of complainant's claim cannot discharge defendant if the complainant's claim is valid.

In the suit at law brought by complainant to recover the amount or value of the fifteen shares, it was held by the supreme court that the remedy was in equity and not at law. *Campbell, Receiver, v. Perth Amboy Loan Association* (1901), 67 N. J. Law (38 Vr.) 71. The substantial ground of the decision, as I read it, was, that under the building and loan association laws, where shares had matured, the fund to be distributed among the shareholders was a trust fund, to be distributed under the direction of the court of chancery, if the directors failed to recognize a shareholder's claim. The decision was not rested on the technical point that the declaration failed to aver that in fact the shares had matured (which would have been an amendable defect), neither was there any suggestion that if there had been an averment that there were other shares than Series "A," a legal cause of action would have appeared upon the declaration of the directors, under its charter, that the shares had matured. The legislation providing for the issue of different series was referred to in the opinion (*Ibid.* 73), but no suggestion was made that in such case the maturity would occur by force of the declaration of the directors. And, as the failure to aver the existence of different series was also an amendable defect, the opinion must, I think, be fairly construed as intended to establish as the law of this case—*first*, that the mere declaration of the directors of the maturity of the shares was not sufficient to establish such maturity as to any one of a series of shares, and *second*, that the fund belonging to any series, when matured, was a trust fund for all the shareholders of the series, and on failure

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of the directors to acknowledge the right of any shareholder, or person claiming under him, to share in the fund, the remedy to establish and recover his share was in equity and not at law. The decision was accepted by the plaintiff in the suit as the law of the case, as he had the right to do, instead of taking the opinion of the court of errors and appeals. *Borcherling v. Ruckelshaus* (Court of Errors and Appeals, 1892), 49 N. J. Eq. (4 Dick.) 340; *Headley v. Leavitt* (Court of Errors and Appeals, 1903), 65 N. J. Eq. (20 Dick.) 748, 755. This bill was thereupon filed in 1902, and, pending the hearing, the court of errors and appeals, in *Cunningham v. Mutual Loan, &c., Association* (November, 1903), 72 N. J. Law (43 Vr.) 175, decided that where shares in different series were issued, the charter and by-laws might determine the manner in which the series should mature and determine, and authorize the directors to declare them matured, and that on such declaration the holder in a series ceased to be a member and became a creditor entitled to his action at law for the declared value of the shares. In the opinion of Chancellor Magie the previous decision of the supreme court in the *Campbell-Perth Amboy Case*, was referred to, but decision on its correctness was expressly reserved. In a still later case, however (*Ryle v. Manchester Building and Loan Association* (March, 1907), 74 N. J. Law (45 Vr.) 840), the court of errors and appeals expressly disapproved the *Campbell Case* as to the right to sue at law, and approved and followed the *Cunningham Case*. The result of these decisions on the question of the proper forum for relief is that, if the present suit were a new suit between the parties, the bill must be dismissed because of the remedy at law, unless the fact that complainant may be an equitable assignee only of the shares (*Broadway Bank v. McElrath* (Chancellor Green, 1860), 13 N. J. Eq. (2 Beas.) 24, 30), might be held to give the court of equity jurisdiction. But independent of this basis for equitable relief, the complainant, having the right to accept as the law of this case the opinion of the court of law delivered in the case, that the remedy was in equity, has, under the cases above cited, the right in this case and against the defendant, to pursue the equitable remedy for the purpose of recovering the amount which

may be due to him, claiming under the assignment. And the subsequent decisions of the appellate court made between other parties establishing finally the general rule that the remedy is at law, while they do not have the effect of annulling the rule of law settled as the law of this case between the parties as to the forum of the remedy, may control the rule as to the amount of recovery which can be had in this suit brought to hearing after the establishment of the amount to be recovered. And the recovery here, if at all, must therefore be by a decree for the amount declared as the value of the shares, admitted by the answer to be the value, and due to complainant as a creditor and not by a decree for account as was supposed in the *Campbell Case*.

The objection therefore that complainant's remedy, if he have any, is at law, made in the answer and pressed at the hearing, is not well founded.

Another technical objection to complainant's recovery is also without merit. This is the objection that the charter of the Middlesex County Bank expired by limitation twenty years after its organization, and in 1892. It is claimed that the proceedings for extending the charter under the law of April 21st, 1876 (*1 Gen. Stat. 1876 p. 972*), were ineffective because this law was a supplement to the "Act concerning corporations," and, as is claimed, did not apply to banking corporations. But the Corporation act of April 7th, 1875 (Revision), in many respects applied to all corporations, including banks, and contained some sections specially regulating the management of the affairs of banks (section 7 is one of them) as to dividends. This supplement has been acted on by the banking and insurance department as authorizing the extension of bank charters as well as others, and in view of the facts that the original assignments of shares in this case was made before the termination of the original charter, and that the bank has been ever since, up to the time of its failure, a *de facto* corporation, making loans and discounts, and transacting a general banking business, the assignments should not be declared invalid because of supposed legal non-existence of the corporation during the loans secured by the assignments.

The real question on the merits of the case as to the Louis Briegs shares is, whether the payment of the original shares on their maturity by the issue and delivery of the certificate of matured shares to Valentine, claiming them as assignee of Briegs, and which have since been paid to a *bona fide* holder, is valid or effective, as against the complainant claiming title to the original shares under an assignment made nearly five years prior to the payment, but of which the association had no notice, other than the notice to Valentine, its treasurer at the time of the issue, of the new certificate, who at the time had the certificate and assignment to the bank in his possession or control as cashier of the bank and as collateral for its loans. It is urged by complainant's counsel in his brief, that notice to or knowledge of Valentine, then the treasurer of the association, was notice to the association of the bank's claim, but as the case clearly shows that Valentine, in having the certificate for matured shares, contemplated an independent fraud on the bank, either for his own benefit or that of the estate of which he was assignee, his knowledge of the bank's rights is not to be imputed to the association of which he was treasurer. *Camden Safe Deposit Co. v. Lord (Vice-Chancellor Bergen, 1904)*, 67 N. J. Eq. (1 Robb.) 489, 492; 2 Pom. Eq. Jur. § 675. The issue of the matured shares must therefore be taken to have been without notice of the bank's rights, and the precise question is, was the issue by the association to Valentine, without the production of the original shares, valid? Had the issue been of shares of a corporation intended to continue the membership and rights of a shareholder, the general rule would seem to be that the issue of such certificate, without requiring the delivery of the one in lieu of which it is issued, is at the risk of the corporation. *Cook Corp. (6th ed.)* §§ 402, 489.

This issue of matured shares was not, however, a certificate evidencing or intended to evidence continued or existing rights as a member or shareholder, but was a satisfaction or settlement of the final rights of the shareholder on distribution of the assets or fund in which he was entitled to share, and the present inquiry is therefore further narrowed, and is, whether in reference to a transaction having the character of the final distribu-



tion by the corporation itself to its members of their share of the assets, the distribution may be made to the member appearing to be such according to the records or books of the company (or his assigns under notice of assignment given), or whether in such case the production of the original certificate is necessary for a valid distribution in order to protect the corporation. For many purposes the books of the corporation are the primary evidence of membership, and the certificate is only secondary as between the corporation and its members. Thus for the purpose of exercising personal rights of membership, such as voting, &c., the corporation may require the transfer on the books, and in the payment of dividends without notice of an adverse claim it is undoubtedly protected by payment to the holder of record on the books of the company. *2 Thomp. Corp. § 2387*. Does the same principle apply to the final distribution of assets of a corporation as to the payment of the dividends? If it does, then the association making distribution to the shareholder of record, without notice of any intervening claim, is discharged from liability for further payment on those shares, even if the certificate be not surrendered. In my judgment the same rule is applicable as between the corporation and its members on the final distribution of assets as on the payment of dividends, and a payment of the share to the shareholder of record at the time of distribution, made without notice of a previous assignment, is a valid payment as against a holder of the certificate by assignment, who has not applied for a transfer on the books.

This payment or distribution was not, however, a payment in cash to the shareholder of record, but a payment or distribution by a non-negotiable certificate of indebtedness, issued to the assignee of the shareholder. The association had notice of this assignment and the certificate was issued as to the assignee. It must therefore be considered as if issued to the shareholder himself, and the designation as assignee, which was merely descriptive or convenient evidence of the character in which Valentine held it, was not, I think, essential to its issue to him, claiming it as assignee. The issue to him personally (being in fact the assignee of Briegs) was sufficient, and the omission of the designation did not make the issue, as between the corporation and

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Briegs, its stockholder, or those claiming under him, an issue to a person not the assign of Briegs. But in reference to this payment, the further question arises as to the effect of its having been made by the issue to Valentine of a non-negotiable certificate, and the status of the case by reason of this fact is one of more difficulty. This certificate being non-negotiable in the hands of Valentine or his assigns, was subject, in the hands of any holder, to the defence that it was procured by Valentine's fraudulent suppression of the previous assignment to the bank, and had notice been given to the association of the bank's claim previous to its payment of the matured certificates to a *bona fide* holder, such subsequent payment would have been at its own peril. But, as appears by the evidence, the Amboy National Bank sued upon its claim under the certificates in the year 1900, and, after judgment against it, the association in February, 1901, paid the claim arising under the certificates, without notice of any claim of the Middlesex County Bank to the payment of the shares for which the matured shares were given.

Complainant's notice of its claim under the assignments does not appear to have been given until March 8th, 1901, the date alleged in the bill and admitted by the answer.

And it further appears by a letter of the complainant, as receiver, to the Amboy bank, dated November 9th, 1899, that the receiver (under a judgment and execution against Valentine) had levied on Valentine's interest in these matured shares, subject to the Amboy bank's claim, and in other shares, and that the receiver consented to a sale of this and other collateral by the Amboy bank to pay its loans to Valentine, notwithstanding the levy, and requested that the surplus only be held. The Amboy bank made the sale, purchased the stock, and then brought suit against the association for the payment, and received payment on the shares.

It does not appear that this consent to the sale was made with knowledge on the part of the receiver that the shares or any of them were issued to Valentine by the association to pay and satisfy the shares held by the receiver, and in the absence of such knowledge, the consent may not operate as a waiver of the receiver's claim, or an estoppel against asserting

it, but the consent is important as bearing on the receiver's delay in making his present claim and the effect of it on his right to relief in equity.

The question, therefore, is, whether the certificate for matured shares having been issued in 1896 and paid in 1901 under these circumstances to a *bona fide* holder after suit, without notice to the association of the claim on the part of the bank, which arose in 1891 by reason of the assignment of the original shares, can now be declared valid.

The bank's right to the share on distribution arose in July, 1896, on the maturity of the shares, and it was then entitled to demand the amounts coming to the Briegs. There was no provision in the charter or by-laws for the issuing of the matured share certificates, and the taking of these by a shareholder was optional purely. If the shareholder be considered as a creditor of the association, and not a *cestui que trust* in a trust fund held for distribution, complainant's right of action for the debt to Briegs, due from the association, accrued on the maturity of the shares, July 1st, 1896. The bill in the cause was filed in October, 1902, more than six years after this cause of action arose. The time fixed in the certificates issued for the payment (January 1st, 1907), fixed the period of suit for those who received the certificates, but for those only, and is of no avail to a creditor claiming the amount due July 1st, 1896, on shares, without regard to these certificates and adversely to the holder of the certificate actually issued.

But, as between the parties to this suit, I take it to be settled as the law of this case, by the decision in the Campbell suit, that the nature of the complainant's right is that of an equitable interest in a fund held in trust by the association for distribution among the holders of shares in a matured series. The statute of limitations is not applicable to such trusts. In *Condit v. Bigalow*, 64 N. J. Eq. (19 Dick.) 504, 514, and *Mills v. Hendershot* (1905), 70 N. J. Eq. (4 Robb.) 258, 267, the New Jersey cases on the application of the statute in equity are considered. And, independent of the statute, delay on the part of the Middlesex County Bank and of the receiver in giving notice of the assignment of the shares, or of their claim under it, may

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be a bar to the suit, especially when, as in this case, the delay has resulted in, or contributed to, the change in the situation by payment to another. The bank and the receiver delayed notice of their claim until nearly six years after the maturity of the shares, and until after the matured shares had been (with the consent of the receiver) sold by a *bona fide* pledgee for the payment of its debt, given perhaps in ignorance of his rights, and until after the shares had been paid by the association to such pledgee as such purchaser. In *Bank of Commerce Appeal*, 73 Pa. St. 59, it was held that the officers of a bank who had, as its trustees, distributed its assets among its stockholders on dissolution, and had paid his share to one of the stockholders of record, without notice of his assignment of his shares, were not liable to a previous assignee of the shares who had not had the same transferred on the books and had given no notice. It was held that in the absence of such notice the payment to the shareholder of record, without requiring production of the certificate, was not an act of negligence on the part of the officers making them liable. The claim of complainant as assignee of the Louis Briegs shares must be held to be barred in equity.

As to the Rosa Briegs shares, the defendant's status is altogether different, and there is no equitable reason for depriving complainant of his rights under the original assignments as collateral as well as under the Rosa Briegs assignment of 1901. The payment to Rosa Briegs of the amount due on four of these shares, if made at all, was made with full notice of complainant's claim, and the payment of the value of one share to Valentine in 1907 was invalid. He claimed not under but adversely to her, and the payment was at the risk of the association, which must look to its indemnity.

The complainant is entitled to a decree based on its rights to the shares of Rosa Briegs, and to the declared value, which is admitted by the answer. The decision in the *Cunningham Case* is effective in this case to establish the amount of recovery to which the decree is to be limited, and no further accounting is either necessary or proper.

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Lister v. Hardin.

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76 Eq.

MARGARET C. LISTER

v.

JOHN R. HARDIN et al.

[Decided November 15th, 1909.]

1. Where a testator directed his executor to pay his widow, during her life, the income derived from the investment of a certain fund which was set aside for that purpose, a portion of the principal of which was misappropriated by the trustee, and the residuary estate has been distributed to and among the residuary legatees, who are also residuary legatees of said fund, the widow cannot compel such residuary legatees to make good out of what has come into their hands the amount so misappropriated by the trustee, and which should have been paid to her by way of annual payments or income.

2. Where the loss of a fund is due to waste or misconduct of the executor and trustee, he and his estate alone can be looked to. No contribution arises against residuary legatees in such a case.

3. The case of *Trenton Trust Co. v. Donnelly*, 65 N. J. Eq. (20 Dick.) 119, distinguished.

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On bill.

*Mr. Harry V. Osborne*, for the complainant.

*Mr. Egner*, for the defendants.

STEVENS, V. C.

This case comes up on demurrer to the bill. Complainant is the widow of Edwin Lister, who, by a codicil to his will, provided as follows:

"Instead of the provisions in my will for my wife I give and bequeath to her the sum of fifty thousand dollars to be paid to her within ten days after vacation of my homestead and after her releasing of her dower right in my real estate, the same to be in full satisfaction of such right, but if she neglects or refuses within six months after my decease to comply with above conditions, she is to have her dower right only in my real estate and no share whatever in my personal estate.

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6 Buch.Lister v. Hardin.

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"If my wife accepts above conditions, I direct my executor to pay her annually during her lifetime the income derived from the investment of the sum of fifty thousand dollars in addition to the above."

The widow accepted the first-mentioned bequest and received \$50,000 in money. As to the second bequest, the bill alleges that complainant received the interest on \$50,000 from the sole executor, Weeks, in accordance with the provisions of the will up to October 8th, 1901, the testator having died on May 18th, 1898; that it was discovered "that Weeks had misappropriated the trust fund *which had been set aside for your oratrix*, to wit, the sum of \$50,000, leaving remaining of such fund about the sum of \$29,350;" that on June 6th, 1902, Weeks was removed from the trusteeship because of his misappropriation, and that the new trustee took possession of \$29,350 the balance left by him. The bill then states that the residuary estate has been wholly distributed to and between Robert Lister and Esther G. Selby, the residuary legatees, who are also residuary legatees of the \$50,000 fund.

Taking the allegations of the bill as a whole, it appears that Weeks, in accordance with the directions of the codicil, set apart the \$50,000 as a separate fund; that he paid the complainant the interest accruing from the investment of it down to October, 1901; that he misappropriated it to the extent of \$20,670, and that for this misappropriation and other acts in breach of his duty as trustee he was removed.

The question is whether the complainant can compel the residuary legatees, to whom the residuary estate has been completely transferred, to make good out of what has come into their hands the amount so misappropriated by Weeks; in other words, whether the annual payment to be made to the widow during her life is a charge upon the whole residuary estate. This must depend upon the intention of the testator as we find it expressed in the language of the bequest. The direction is to pay "the income derived from the investment of the sum of \$50,000." That means that the executor is to take \$50,000 out of testator's estate, invest it and pay the income, whatever it may be, derived from the sum thus invested. It thus appears that what the testator intended to give, and did give, was a definite sum of money,

the interest of which was to be paid to Mrs. Lister for life and the principal of which was to be paid to his two children at her death, and not an annuity chargeable on the entire residue.

In *Willmott v. Jenkins*, 1 Beav. 404, Lord Langdale says: "If an executor makes payment to a legatee in person or to a trustee for a legatee, or makes such appropriation as is equivalent to payment, the other persons entitled under the will are not to be called on to contribute for any loss which may happen to the fund so paid or appropriated." It was held there that the appropriation was incomplete because the executor had carried several sums to one account and had invested them in his own name, without making any declaration of trust, but here the bill states that the sum of \$50,000 was set apart by the executor for the particular purpose directed and that all the other money of the estate was distributed. Even where a testator gave an annuity, which in general stands upon a different footing, and directed that it should issue "out of so much stock in the navy five per cent. annuities as shall be fully sufficient to produce and answer the payment" of the yearly sum given, Vice-Chancellor Shadwell held that the investment having been made as directed, the legatee was not entitled to have the deficiency caused by the enforced conversion of the five per cent. into a four per cent. annuity, supplied out of the testator's residuary estate. *Kendall v. Russell*, 3 Sim. 424.

The case of *Mills v. Smith*, 141 N. Y. 256, is directly in point. There a testator gave to his executors the sum of \$20,000 in trust to invest on bond and mortgage and apply the net income to L. M. for life and at his decease to divide the principal among his children. The fund was invested and subsequently misappropriated. The effort was to hold the residuary legatees. Justice Gray said: "This action is simply an attempt to fasten upon the distributees of testator's residuary estate the responsibility for the subsequent default of the executors, as trustees for plaintiff's father. This cannot be done. Where the loss of a fund is due to waste or misconduct of the executor and trustee, he and his estate alone can be looked to. No claim for contribution arises against residuary legatees in such a case."

The authority mainly relied upon by complainant's counsel (*Trenton Trust Co. v. Donnelly*, 65 N. J. Eq. (20 Dick.) 119) is not in point. There money had been bequeathed in trust to pay the interest to testator's wife for life, remainder to his sisters and the heirs of his deceased brother. The *corpus* was diminished by an unfortunate investment and the question was how the loss was to be borne as between the widow and those who took the principal at her death. The widow was held entitled to part of the *corpus* to indemnify her, in part, against her loss of interest. There was no attempt to make the residuary or other legatees contribute to or make good the loss suffered. The bill in the present case is not framed upon the theory of that case and no facts are stated that would make its principle applicable.

The complainant also asserts that when she relinquished her dower right she gave a valuable consideration for the legacies and that she therefore stands upon a different footing from the ordinary legatee. If the question had been whether she was not entitled to a preference on a deficiency of assets, she might have prevailed, but the question here is quite different. She received, in the first instance, all that she bargained for. The estate gave her \$50,000 in cash and it appropriated to her use, in the hands of a trustee, the other \$50,000. The mere fact that that trustee was Weeks, the executor, instead of someone else, can make no difference so far as the legal aspect of the case is concerned. If the trustee subsequently misappropriated the money, he is responsible and not the other distributees of the estate.

The bill should be dismissed.



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Dixon v. Dixon.76 Eq.

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WILLIAM H. DIXON

v.

JOSEPHINE DIXON.

[Decided December 11th, 1909.]

1. Where a mother, after securing a judgment in a New Jersey court awarding her the custody of her children, left the state, and the father, on application to the court, obtained a modification of the judgment permitting the children to visit him in the State of New York, where he resided, the order of modification was within the protection of the clause of the federal constitution declaring that full faith and credit shall be given in each state to judicial proceedings of every other state.

2. Where the mother, in such case, commenced an action for divorce in the state to which she removed, the court, in such action, might determine the right to custody of the children on conditions arising since the order of the New Jersey court, but could not base its adjudication on evidence of facts occurring before that order.

3. Where the mother, on application in the divorce suit for an order for the sole custody of the children pending suit, offered no evidence of facts occurring since the modified order of the New Jersey court, except that on the return of the children to the mother from a visit to the father, under order of the court, they were in poor health, such poor health not being ascribed to the treatment of the father, an order in such divorce suit, granting the prayer for such custody, being based on the facts occurring before the order of the New Jersey court, was of no effect, since it failed to give full faith and credit to the New Jersey judgment.

4. Where, on presentation of a petition by a husband for commitment of the wife for violating an order as to the custody of the children, she had not yet disobeyed it, but her counsel had given notice that she would not obey it in view of an order of a court of another state, and her counsel disavow any intentional disrespect to the court making the former order, she will not be adjudged in contempt, though the order of the foreign court is not valid.

5. Where, after an order granting to a wife the custody of the children with a provision that they be sent to visit at the husband's home two months of each year, she commenced suit in another state for divorce, and procured an order for sole custody of the children pending suit, but the situation was otherwise unchanged, the former order would not be modified to give the husband custody of the children.

6. In a proceeding for contempt for violating an order as to the custody of the children of divorced parents, where the right to the custody was determined according to the claims of the petitioner, but there had not been an actual violation of the order, and only notice of an intended violation, neither party would be charged with costs.

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6 Buch.Dixon v. Dixon.

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On petition.

*Mr. Richard V. Lindabury* and *Mr. J. Holmes* (of New York), for the petitioner.

*Mr. Gilbert Collins*, for the defendant.

STEVENS, V. C.

This case comes up on petition. The petitioner asks the court to punish the defendant, Mrs. Dixon, for her contempt in disobeying an order, made July 24th, 1907, which directed that the two children of petitioner and defendant, whose custody was continued in defendant, should be sent with their nurse to visit their father two months in each year—one month during the summer or early autumn at his country home in Pittsfield, Massachusetts, and one month during the winter at his home in New York City. The petitioner also asks that the general custody of the children be transferred to him.

At the time of the institution of this proceeding by the father, in June, 1905, he was living in New York, and his wife, the defendant, was living separate from him, in New Jersey. The children were then two and three years old. Their custody was awarded to the mother but the father was given the right to visit them.

After that the mother went to Maine and on the father's application the original order was modified by that of July 24th, 1907. Mrs. Dixon's answer to the present application is that the order last mentioned has been superseded by an order in a divorce suit instituted by her in Maine, made on August 30th, 1909, awarding the sole custody of the children, *pendente lite*, to her.

The original order of this court was appealed from and affirmed. *Dixon v. Dixon*, 71 N. J. Eq. (1 Buch.) 281. The second order, made after careful consideration of the question then raised, was acquiesced in and obeyed until the Maine divorce proceeding was instituted. That question was whether this court continued to have jurisdiction over the children after they

had been taken by their mother to Maine. The decision was in favor of the jurisdiction. 72 N. J. Eq. (2 Buch.) 588.

The question now to be considered is twofold—*first*, is the order of July 24th, 1907, entitled to full faith and credit under the federal constitution? *second*, if it is, does the subsequent order of the justice of the supreme court of Maine supersede it?

There can be no doubt that the order of July 24th, 1907, is within the protection of that clause of the federal constitution which declares that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state." Discussion is unnecessary, for the decisions are all one way. The rule is that in any controversy between the parents relating to the custody of their children the award made by a competent tribunal is *res adjudicata*, and cannot thereafter be questioned on the same state of facts. *Mercein v. People, ex rel. Barry*, 25 Wend. 64; *Matter of Lederer*, 38 Misc. 668; *Bleakley v. Barclay*, 75 Kan. 462; *Brooke v. Logan*, 112 Ind. 183; *Slack v. Perrine*, 9 App. Cas. Dist. Col. 128; *State v. Baird*, 19 N. J. Eq. (4 C. E. Gr.) 481-486; *Stetson v. Stetson*, 80 Me. 483. Speaking of a child whom it was awarding to the custody of a mother living in Massachusetts, Justice Danforth, in the Maine case last cited, said: "Though she (the mother) may not personally be within the jurisdiction of the court, the subject-matter is, so that the judgment of the court will be valid and binding upon her, and by the provisions of the constitution of the United States, may be enforced against her, though in another state."

But the adjudication is an adjudication upon the issue presented and upon that only. So far as children are concerned, the situation is, or may be, constantly varying. The parent fit to have the custody of his children to-day may, by reason of changed circumstances, become unfit to-morrow. The above rule does not prevent the courts of the state, within whose limits the children may be, from considering whether a change in the situation may not call for a new disposition. But the changing circumstances must be, obviously, those that affect the children, not those that concern the parents. To illustrate by the case in hand: In her petition, presented to the Maine tribunal, Mrs.

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6 Buch.Dixon v. Dixon.

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Dixon says that she lived with her husband until May, 1904, and that, while so living, he treated her with extreme cruelty, whereby her health and life became endangered. It is manifest that evidence bearing upon his disposition and upon his conduct towards his wife might have an important bearing upon his fitness to have the custody of his children, either for two months in the year or for any lesser period, and that it must or should have been considered by this court when the order of July 24th, 1907, was made. By reason of the effect of the doctrine of *res adjudicata* this evidence could not be made the basis of an independent adjudication by another court. If this were not so, the rule established by the decisions to which I have referred would be nullified.

But, on the other hand, it is equally manifest that it might be shown that, since the date of the prior adjudication, the father had so conducted himself as to have become unfit to associate with his children; that any association with them would be injurious to their morals or welfare.

While this court, therefore, as has been decided, may still have jurisdiction, if it sees fit to exercise it, it does not follow that the courts of Maine may not also have jurisdiction as long as the children are actually present in that state, and it must be conceded that the Maine tribunals are, for the time being, in a position to exercise it more beneficially and effectually than this court can.

But, when the mother refuses to allow her children to visit their father, the question for the courts of both jurisdictions is not, whether, in view of all that has occurred at any time in the past, the father is to be denied his parental right, but whether such a change has taken place in his character and circumstances since the date of the order of July 24th, 1907, as to require such denial. The evidence taken before me on this hearing, a hearing in which both parties participated, shows that such a change has not, in fact, occurred. If the same evidence, on the same issue, had been taken by the Maine tribunal, I have no doubt it would have reached the same conclusion.

One naturally asks why the husband, having been notified of the application, did not appear, at least by counsel. The case

presents a somewhat singular situation. Mr. Dixon is domiciled in New York. By the law of that state he may, in so far as the proceeding is a divorce proceeding, disregard notice served upon him in New York. The Maine decree will not, in New York, be treated as severing the marriage bond.

The application for the custody of the children was made, not as an independent proceeding, but in the course of the proceeding for divorce.

Should he have appeared to contest it, would or would not such appearance be treated as an appearance in the cause and would it give validity in New York to an adjudication which would otherwise be disregarded by the courts of that state? No doubt, under advice of counsel, he was unwilling to do that which would raise such a question.

This brings me to the real question in the case, and, as I conceive, the only debatable one. "Ought this court to presume that the order of Mr. Justice Spear was based upon evidence showing a change of circumstances?" Whether I look at the Maine record or at the evidence presented to him on the part of the wife, I am unable to find any indication that her counsel presented to Judge Spear the only question which it was competent for them to present.

First, as to the issue made in the record: In her libel for divorce Mrs. Dixon asks simply for the custody of her children. She does not state any facts pertinent to this part of her prayer. The facts that she states relate only to her prayer for divorce and to a time anterior to July, 1907.

Her subsequent petition praying for the custody of her children reads as follows:

*"To the Honorable Justices of the Supreme Judicial Court:*

*"Respectfully represents Josephine W. Dixon, of Portland, in said county of Cumberland, that she has heretofore filed a libel in said court against William H. Dixon, praying for a divorce and asking for the custody of her minor children, William P. Dixon, Jr., and Barbara W. Dixon, named in said libel; that said libel has been duly served upon the said William H. Dixon and that it is now pending in said court; that said children are now under her care and are residing with her in the State of Maine, but that the said William H. Dixon has made demand upon her to deliver said children to him in the State of Massachusetts.*

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Dixon v. Dixon.

"Wherefore she prays this honorable court to give her the custody of said children during the pendency of said libel.

"Dated this 16th day of August, A. D. 1909.

"JOSEPHINE W. DIXON."

Mr. Dixon failing to appear, an *ex parte* hearing was had, and on August 30th Mr. Justice Spear made the following order:

"It appearing that said libel for divorce is pending in said court; that said petition has been duly served upon the said William H. Dixon; that said Josephine W. Dixon resides in said State of Maine, and that she is a suitable person to have the care and custody of said William P. Dixon, Jr., and the said Barbara Dixon, minor children named in said libel, and who reside with the said Josephine W. Dixon in said State of Maine, it is

"Ordered, adjudged and decreed that, pending said libel for divorce, the said Josephine W. Dixon shall retain and have the sole care and custody of said minor children.

"A. M. SPEAR.

"August 30th, 1909.

*Justice Supreme Judicial Court.*"

As this order adjudges that Mrs. Dixon is to have the *sole* care and custody of her children, it cannot be doubted but that it conflicts with the prior order of this court.

It was held in *Reynolds v. Stockton*, 140 U. S. 254, that a judgment not responsive to the pleadings is a nullity in so far as it is not responsive, and in *Munday v. Vail*, 34 N. J. Law (5 Vr.) 418, that a decree entirely aside from the issue raised in the record is invalid and to be treated as void, even in a collateral proceeding.

Under the issue raised by Mrs. Dixon's petition, a decree that Mr. Dixon had, since July 24th, 1909, become an unfit person to have that limited enjoyment of his children's society which the order of this court had given him, would not have been responsive to the allegations of a pleading, which averred merely that the children were then under her care and that William H. Dixon had made demand upon her to deliver said children to him. Her allegation that she had filed a libel, while it showed a change in her relations with her husband, did not show a change in the relations of that husband to his children.

But not only was no proper issue made by her pleading: she did not produce any evidence of unfitness at the *ex parte* hearing. It is true that according to the evidence of Mr. Hutchin-

son she stated to Mr. Justice Spear that after their last visit to their father (which occurred in the winter of 1909) the children had returned (to Maine) in poor health, but no attempt was made to show that their condition was attributable to neglect or misconduct on his part. They might have contracted colds on the journey back to Maine, after they had left their father's house, and such was the evidence given on the hearing before me. No other evidence of unfitness was even suggested. The order made on the issue as she made it did not, therefore, give full faith and credit to the decree of July, 1907, and, according to the above-cited cases of *Stockton v. Reynolds* and *Munday v. Vail*, may be disregarded even in a collateral proceeding.

I am of opinion, therefore, that that decree is still in force. It provides that the children shall be sent, with their nurse, to visit their father for a month in the winter and for a month during the summer or early autumn. When Mr. Dixon's petition was presented Mrs. Dixon had not as yet disobeyed it. Her solicitor had merely given notice that she would not send the children in view of what she regarded as a change in the situation. Her counsel disavow any intentional disrespect. They appear to have thought that the Maine order, which they were endeavoring to obtain, would supersede the New Jersey order. In view of these circumstances, it would not be proper at this time to adjudge Mrs. Dixon in contempt.

The petitioner asks that the custody of the children may be awarded to him. The situation as it existed in July, 1907, so far as the children are concerned, remains unchanged. I see no reason why the order should be modified.

In view of the circumstances, I think neither party should pay costs to the other.

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6 Buch.Streeter v. Braman.

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THOMAS W. STREETER, trustee in bankruptcy of Hammond  
Braman,

v.

GRENVILLE D. BRAMAN, individually and as executor of Susie  
A. Braman, deceased.

[Decided October 30th, 1909.]

1. An affidavit attached to the bill cannot be considered as a part thereof.

2. Testatrix gave her entire estate to her two sons and made them executors. The will was proved January 3d, 1907, and the executor who qualified filed in the orphans court on April 26th, 1909, an inventory showing about \$1,500 cash on hand, and at the same time filed his final account. The son who did not qualify as executor was adjudged bankrupt on December 1st, 1908, and complainant was appointed trustee in bankruptcy several months thereafter and brought a suit against the executor to transfer to the chancery court the settlement of the executor's account pending in the orphans court. The bill alleged that testatrix received large amounts during her lifetime and turned over to defendant money and securities amounting to \$23,000, which property was owned by her at her death, together with other property; that defendant's relation to testatrix precluded a gift thereof to him, and complainant believed that testatrix did not dispose of such property, and it should have been in defendant's possession and accounted for as assets of the estate; that it was impossible to secure a complete accounting in the orphans court, it being without adequate jurisdiction to compel discovery of the assets of which testatrix should have died seized. Fraud by the executor, or his pecuniary irresponsibility for any failure to account, was not alleged.—*Held*, that where the chancery court and the probate court have concurrent jurisdiction, it is a matter of discretion whether the former will intervene, either before or after the probate jurisdiction has attached, and, in view of the enlarged powers of the orphans court in such cases, the complainant showed no reason why the chancery court should assume jurisdiction.

3. A bill cannot be sustained as a bill for discovery where it did not allege that a discovery was sought in aid of a proceeding in another court, but merely sought to enjoin a pending proceeding in another court so as to transfer the case to the chancery court.

4. A bill cannot be sustained as a bill for discovery where it prays for an answer without oath.



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Streeter v. Braman.

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76 Eq.

On demurrer.

*Mr. Isaac W. Carmichael and Mr. William M. Stockbridge* (of Massachusetts), for the demurrant.

*Mr. John M. Dickinson*, for the complainant.

STEVENSON, V. C.

My conclusion is that the demurrer should be sustained.

1. The object of the bill is to transfer to this court the settlement of an executor's account now pending in the orphans court of Ocean county. The main facts are as follows:

The testatrix, Susie A. Braman, died March 8th, 1907, leaving her estate to her two sons whom she appointed executors. One of the sons only, the defendant above named, qualified as executor. The other son is the bankrupt whose interest in the estate is now vested in the complainant. The will was proved in Ocean county on June 3d, 1907. On or about December 1st, 1908, Hammond Braman was adjudged a bankrupt by the United States district court in Massachusetts, and subsequently, whether one month or three months after the adjudication does not appear, the complainant was appointed trustee of the bankrupt's estate. On or about April 26th, 1909, the defendant filed an inventory showing a single item, viz., cash amounting to \$1,549.66, and at the same time filed a final account charging himself with the inventory and praying "allowance for various expenditures," none of which are questioned in any way. In view of the allegation that the defendant "although often requested" to file an inventory failed, and refused to do so until he filed his account, and until the complainant had instituted proceedings to compel him to file such inventory, it is important to note that the delay in filing the inventory where the two brothers alone appear to have been interested from June 3d, 1907, until after December 1st, 1908, is not significant of any substantial violation of duty on the part of the defendant, and that the inventory and final account were actually filed within four months after the adjudication of bankruptcy and within a less

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6 Buch.Streeter v. Braman.

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time, perhaps only a few weeks, after the complainant had been appointed trustee and acquired an interest which entitled him to call upon the defendant to account.

An affidavit attached to the bill alleges that the complainant has filed exceptions to the account of the defendant in the surrogate's office of Ocean county. This affidavit, of course, cannot be considered as part of the bill, but counsel for the complainant in his brief treats the filing of exceptions as a fact presented to this court by the demurrer, and makes an argument in regard to that fact. It would seem that as against the complainant the bill might well be deemed amended so as to include the allegation that exceptions are pending in the Ocean county orphans court. But however this may be no obstacle in the way of the filing and having a complete trial of exceptions in the orphans court is suggested by the bill.

The bill sets forth that the testatrix received large amounts of money and securities during her lifetime, and that in 1903 she "turned over" moneys or securities amounting to \$23,000 to the defendant to hold for her; that this property was owned by the testatrix at her death and formed part of her estate; that the testatrix also owned certain valuable jewelry and other chattels which "formed a part of her estate;" that the testatrix for three years next preceding her death lived with the defendant and during that time he had sole custody of her estate; that so far as the complainant is informed she made no disposition of any of her estate except the distribution of a certain sum specified; that the securities, &c., placed in the hands of the defendant, together with the jewels and other chattels above referred to "*should have been* in the possession of said defendant and accounted for by him as assets of her estate." The bill also alleged that the relations between the testatrix and the defendant "were such as to preclude the idea of any gift of any property whatever" from her to him, and that, as the complainant is informed, she made no other gift or distribution of the estate which she placed in the care and custody of the defendant.

Upon these facts the bill alleges that the complainant is advised and he avers that it is

"wholly impracticable and impossible to proceed in the orphans court of Ocean county to secure a complete accounting of the assets of testatrix's estate which court is without full, complete and adequate jurisdiction in the premises to compel the discovery by said executor of the assets of which his testatrix died seized or *should have died seized*, together with an account of the kind, character and amount thereof."

and that the court of chancery alone has power to grant relief. The sole charge against the executor in the bill is that he has failed to inventory and account for a substantial portion of the estate of the testatrix. He is not charged with any fraud whatever unless the mere failure to account for assets before any opportunity has been afforded for an explanation is to be regarded as an indirect charge or suggestion of embezzlement. There is no specification of any objections to the account including the account of disbursements which the defendant has filed excepting his failure to account for these assets which apparently at some time disappeared. There is no direct charge that the defendant had any portion of the estate of the testatrix in his possession at the time of her death for which he has failed to render an account. The exact charge is that certain assets "should have been in the possession" of the defendant and should have been accounted for by him. There is no charge that the defendant is not absolutely responsible pecuniarily for any demand that may be made upon him growing out of his failure to discharge his duty as executor and account for all the property of the deceased which came to his hands or which "should have" come to his hands.

2. The law applicable to this case may be found in a few recent decisions of this court and the court of errors and appeals. *Filley v. Van Dyke*, 74 N. J. Eq. (5 Buch.) 571; *Wyckoff v. O'Neil*, 71 N. J. Eq. (1 Buch.) 681; *Woolsey v. Woolsey*, 72 N. J. Eq. (2 Buch.) 898; *Pyatt v. Pyatt*, 46 N. J. Eq. (1 Dick.) 285.

The test of the propriety of this demurrer is presented by the question whether any "special reason" appears upon the face of this bill why the court of chancery should interfere with the orderly administration of this estate by the orphans court of Ocean county and take upon itself the burden of such administration. I am quite unable to discover any *special* reason, or,

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6 Buch.Streeter v. Braman.

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indeed, any reason whatever, for such interference. If this cause should be removed to this court because it is "wholly impracticable and impossible" for the orphans court of Ocean county to accomplish justice, it would seem that in all or almost all cases where an executor is charged with merely failing to account for an asset which "should have been in his possession" any party interested has the option to remove the administration of the estate into the court of chancery. If the complainant is justified in objecting to the forum in which this cause now lies, it would also seem that the efforts of the legislature for many years to expand the powers of the orphans court by giving those courts equitable jurisdiction for the recovery of legacies and distributive shares, power to compel executors and administrators to make discovery under oath, and produce books and papers, to try exceptions to accounts, to compel the giving of additional security, to remove executors and administrators for waste, neglect or abuse of trust of any kind, have still left the orphans courts in an extremely feeble condition so that parties interested in estates still find it "impracticable and impossible" to get adequate relief in them in very simple cases.

It must always be borne in mind that in cases like this, where the court of chancery has concurrent jurisdiction with a law or probate court, and it is a matter of discretion whether the court of chancery will intervene, either before or after the law or probate court has taken jurisdiction, to use the language of Vice-Chancellor Reed in *Bellingham v. Palmer*, 54 N. J. Eq. (9 Dick.) 136, 139, it is, "the present and not the past method of legal procedure which should be regarded." This principle is applied to bills for an accounting (*Bellingham v. Palmer*, *supra*; *Daab v. New York Central Railroad Co.*, 70 N. J. Eq. (4 Robb.) 489, 493, bills for a new trial; *Hannon v. Maxwell*, 31 N. J. Eq. (4 Stew.) 318, 329; *Walcott v. Jackson*, 52 N. J. Eq. (7 Dick.) 387, 390; *Hayes v. United States Phonograph Co.*, 65 N. J. Eq. (20 Dick.) 5, 8), and must be generally applicable to all cases where the jurisdiction of a court of equity or a special reason for the exercise of such jurisdiction is based upon the claim that the remedy in the law or probate court is inadequate.

Many of the older decisions of this court where jurisdiction has been taken of proceedings in the orphans court must be read and applied with the full recognition of the fact that at the time those decisions were rendered the remedial agencies and powers of the orphans court were to a large extent undeveloped. The legislature by steadily increasing the powers of the orphans court has necessarily decreased the number of instances in which the jurisdiction of this court now under consideration can wisely and discreetly be exercised.

It is urged on behalf of the complainant that the decision of the court of errors and appeals in *Filley v. Van Dyke*, *supra*, sustains or tends to sustain the complainant's bill. The "special reasons" in that case found sufficient by the court of last resort for the interposition of the court of chancery are conspicuously wanting in the present case. The reasons specified (*p. 944*) are "long delays unexplained, the inaction of the parties, the retention of assets by Frederick (a former removed executor charged with the possession of assets and financially irresponsible) and *above all* the action of the judge" of the orphans court who was a party defendant in the chancery suit "in passing an important item of account in which he was personally interested." The delays referred to included the failure to file an account "though seven years had elapsed." In the present case, as we have seen, there is no delay which is significant of fraud or substantial violation of duty causing injury to anyone. But in this *Van Dyke Case* the court of errors and appeals find as prominent "above all" other reasons for equitable intervention that the particular judge of the orphans court having jurisdiction of the estate in question was disqualified by interest from attending to the particular case. I do not think that the decision of the court of errors and appeals in *Filley v. Van Dyke*, or the opinion delivered by Mr. Justice Parker on behalf of the court in that case, suggests any adequate "special reason" why the court of chancery in this case should oust the orphans court of Ocean county of its jurisdiction and assume the administration of Mrs. Braman's estate.

3. It is conceded by counsel for the complainant that the bill cannot be sustained in this case as a bill for discovery alone. The

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bill does not allege that discovery is sought in aid of a proceeding in any other court, but, on the contrary, seeks to enjoin a pending proceeding so as to give the court of chancery sole power to grant relief for the grievance set forth in the bill. *Story Eq. Pl.* §§ 326, 560; *United N. J. R. Co. v. Hoppock*, 28 N. J. Eq. (1 Stew.) 261. It is also, in my judgment, a sufficient answer to any suggestion that the bill can be treated as a bill for discovery only that it prays for an answer without oath. In the case of *Manley v. Mickel*, 55 N. J. Eq. 563, Mr. Justice Collins, speaking for the court of errors and appeals, leaves this point undecided, but stigmatizes the filing of such a bill for discovery as "a fruitless experiment." *Lex nil frustra*. See *Daab v. New York Central Railroad Co.*, 70 N. J. Eq. (4 Robb.) 489.

IDA A. PETERSON

v.

CYRUS D. REID and FRANK T. MORRILL &amp; COMPANY.

[Decided November 8th, 1909.]

1. In a suit to foreclose a purchase-money mortgage, a cross-bill, praying not only for an abatement of the mortgage debt, but for the surrender of the mortgage for cancellation, on its being found that the debt had been discharged, will be considered on demurrer as presenting equitable claims properly presented by answer by way of cross-bill, though an abatement of the mortgage debt may be gained by answer.

2. A cross-bill, in a suit to foreclose a purchase-money mortgage, which alleges that the assignee of the mortgagee bringing the suit has no interest in the litigation, but is prosecuting it for the mortgagor, and which demands damages for the breach of the mortgagee's covenant to fill in the land sold by him to the mortgagor, is not demurrable for failing to make the mortgagee a party, but the assignee may make him a party.

3. The mere fact that the damages sought to be set up as an abatement of the mortgage debt in a suit to foreclose the mortgage are unliquidated does not prevent equity from granting the abatement; the damages may be ascertained by a jury in a law court or by the court of chancery.

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4. Where a vendor of lowland of small value covenanted to fill in the same, and the purchaser gave a mortgage for the price, based on the valuation of the land filled in. one succeeding to the rights of the purchaser under the conveyance from the vendor and his covenant could, in a suit to foreclose the mortgage by an assignee having no interest in the litigation, reduce the mortgage debt to the extent of the damages sustained by the vendor's breach of covenant.

5. A vendor of lowland of small value covenanted to fill in the same. The purchaser gave a mortgage for the price, based on the valuation of the land filled in. A third person acquired the purchaser's rights. After the time for performance, the vendor and the third person entered into an agreement, whereby the vendor agreed to perform the covenant. Prior to the agreement the vendor had assigned the mortgage to an assignee, who was a mere volunteer. and who had no actual interest in the matter. —*Held*, that in a suit by the assignee to foreclose the mortgage, the third person could reduce the mortgage debt to the extent of the damages sustained by the vendor's breach of the original covenant.

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On demurrers to cross-bills.

*Mr. Francis V. Dobbins*, for the complainant, the demurrant.

*Messrs. Tennant & Haight*, for the defendants, filing answers by way of cross-bills.

STEVENSON, V. C.

1. In view of the specification of grounds of demurrer and the argument of counsel in this case, it is unnecessary to discuss the technical question whether the defence set up in the answers by way of cross-bill could or should have been presented to the court by the answers. The cross-bills pray not only for an abatement of the mortgage debt, but, in case of such abatement, the mortgage debt shall be found to have been discharged, as the defendants insist is the case, that the mortgage be surrendered up for cancellation. This court will consider that for all present purposes the equitable claims which the defendants set forth against the mortgage indebtedness are properly presented by answers by way of cross-bill, even though the defendants might have gained the benefit of any abatement of the mortgage debt by an answer. See *O'Brien v. Hulfish* (*Court of Errors and Appeals*, 1871), 22 N. J. Eq. (7 C. E. Gr.) 471, 475; *McMichael v. Webster* (*Court of Errors and Appeals*, 1898), 57 N.

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*J. Eq.* (12 Dick.) 295; *Dayton v. Melick* (Chancellor Runyon, 1880), 32 *N. J. Eq.* (5 Stew.) 570; *S. C. (Court of Errors and Appeals, 1881)*, 34 *N. J. Eq.* (7 Stew.) 245.

2. The first objection to the demurrer is that the Carteret Realty Company, the original mortgagee, ought to have been brought in as a party in accordance with the practice prescribed or recommended in *Green v. Stone*, 54 *N. J. Eq.* (9 Dick.) 387, 401. See *Haberman v. Kaufer*, 60 *N. J. Eq.* (15 Dick.) 271, 277. It is unnecessary, I think, in this case to discuss the extent to which new parties may be brought into a cause in this court by making them parties defendant to a cross-bill, or an answer by way of cross-bill, or in what manner, in case the pleading is an answer by way of cross-bill, the new parties may or must be brought into court. The elaborate brief for the demurrant, which seems to present every possible argument against the sufficiency of the answers by way of cross-bill on the merits, does not undertake to state any reason whatever why the Carteret Realty Company should be made a party to this suit. If it be conceded that the Carteret Realty Company is interested in the question of damages from its breach of covenant raised by the answers by way of cross-bill, it may follow that this company is a proper party to the cross-bills. It does not follow that this company is a necessary party to this litigation for the accomplishment of justice between the parties who are already before the court. The result of leaving out the Carteret Realty Company is simply to leave that company unaffected by the decree in this cause. The cross-bills allege that the complainant in fact has no interest in this litigation, but is prosecuting the same for the benefit of the Carteret Realty Company, and in fact is a mere cover or representative of that company. The complainant may amend her bill by making the Carteret Realty Company a party, but I see no basis for any objection on the part of the complainant that the defendants by cross-bills or answers by way of cross-bill do not bring the Carteret Realty Company into this litigation.

3. The only other objection to the sufficiency of these answers by way of cross-bill is the general one of want of equity.



The facts set forth in the answers by way of cross-bill are somewhat complex and voluminous. It will not be necessary to state all these facts in order to set forth distinctly the point on which is placed the decision that the demurrers should be overruled.

The Carteret Realty Company conveyed to one Reid, to whose rights the defendants succeeded, a tract of land containing a little over three acres. The price was \$5,000 per acre. The land was low and marshy and of small value unless filled in. As a part of the consideration on Reid's part the Carteret Realty Company covenanted that on or before a date specified it would fill in a certain portion of the premises, and within six months after the conveyance it "would fill the whole of said premises to the height of three feet above the surface as it then existed." Mr. Reid paid \$5,000 in cash and gave back a purchase-money mortgage to secure the balance of the price of the land, viz., \$10,365, payable in about three years thereafter. The mortgage contains a provision to the effect that the same was "given to secure part of the purchase price and *conditions* named in said deed." The Carteret Realty Company failed almost completely to perform its covenant, having partially filled in only a small strip of the land in question. A large part of the consideration of the mortgage has manifestly failed. What the Carteret Realty Company in effect contracted in its deed of conveyance to give the mortgagor was this parcel of land containing about three acres filled in to a certain grade.

After the conveyance and purchase-money mortgages were made the Carteret Realty Company assigned the mortgage to the complainant. This assignment appears to have been made after the Carteret Realty Company had defaulted in its agreement to fill a portion of the land, but before the six months had expired within which the company was obliged by its contract to fill in the remainder. The grantee and mortgagor, Reid, acted merely as agent for one Morrill to whom he conveyed the land and transferred all his rights in the covenant with the knowledge and consent of the Carteret Realty Company. Subsequently Morrill transferred the land and all his rights in the covenant

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to the defendant corporation Frank T. Morrill & Company. It appears distinctly that the defendant Frank T. Morrill & Company has succeeded to all the rights of the defendant Reid under the conveyance from the Carteret Realty Company and the covenant of the company therein contained. It also appears that the assignment of the bond and mortgage made by the Carteret Realty Company to the complainants "was made without any valuable consideration and with the intention of defrauding" Reid, Morrill and the Frank T. Morrill & Company, "by having the complainant enforce the payment of said mortgage for the benefit of said Carteret Realty Company, without said company performing its said covenant." The cross-bills allege that the Carteret Realty Company has no assets from which any judgment against it could be satisfied, and that the cost of filling in the land to the height called for by the covenant "will alone exceed the said principal sum of said bond and all interest alleged by the complainant to be due thereon."

It is argued strenuously on behalf of the complainant that the answers by way of cross-bill set up no equity which can be recognized or enforced in favor of the defendants or either of them in this suit. The defendant Reid stands liable upon the bond which accompanied the mortgage. The defendant Frank T. Morrill & Company own the land which the complainant seeks to have sold for the satisfaction of her mortgage. The case will be considered as if the two defendants had united in a single answer and a single answer by way of cross-bill.

It seems to me upon both principle and authority that if the allegations of these answers by way of cross-bill are established by the proofs, the defendants have a clear equity to have the damages from the breach of covenant of the Carteret Realty Company ascertained and applied as an abatement of the mortgage debt. In case the mortgage debt is found to be extinguished, the bond and mortgage should be delivered up for cancellation. This result follows, I think, from the logical application of the principle laid down in the case of *Kuhnen v. Parker* (*Vice-Chancellor Stevens*, 1897), 56 N. J. Eq. (11 Dick.) 286. After discussing numerous cases Vice-Chancellor Stevens concludes (p. 289):

"I think that the true principle of decision goes at least to this extent. If the mortgagee foreclose a purchase-money mortgage against the mortgagor, and the mortgagor shows that the covenant against the encumbrances has been broken in such manner as to give him a claim to substantial damages, he may reduce the mortgagee's demand to the extent of those damages."

The cases cited show beyond question that the mere fact that the damages sought to be set up as an abatement of the mortgage debt are unliquidated, is a circumstance which gives the court no difficulty. The damages may be ascertained or assessed by a jury in a law court, by a master, or under our present system by testimony of witnesses taken in open court.

In *Kuhnen v. Parker*, however, the court dealt with unliquidated damages caused by the breach of a covenant at the time the conveyance was made, and purchase-money mortgage given back. The covenant under consideration was a covenant against encumbrances, and, as the court pointed out, was broken as soon as it was made. In respect to this feature the present case manifestly is different. The covenant was contained in the deed of conveyance, but it was not broken as soon as it was made, or when the purchase-money mortgage was given back. The breach followed some weeks later. I am unable, however, to see any reason in the distinction just mentioned for the application to this case of any different principle from that which was applied in the case of *Kuhnen v. Parker*. In each case there is complete or at least a partial failure of consideration. In *Kuhnen v. Parker*, perhaps, if the situation is to be described with metaphysical accuracy, the defect in the mortgage was not so much a partial failure of consideration as a partial lack of consideration, while in the present case there was subsequent to the execution of the mortgage a complete or partial failure of its consideration. The consideration of the mortgage was the conveyance of the land and the covenant of the grantor to fill the land in. The mortgagor plainly received precisely what he was entitled to. As between the original parties to this transaction it seems to me that we have a perfectly plain case where the damages of the mortgagor from the failure of the mortgagee to perform its covenant constitute a proper abatement of the mort-

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gage debt in the foreclosure suit. If a man conveys a parcel of unimproved land and at the same time covenants to erect a valuable building upon it, and takes back a purchase-money mortgage based on the valuation of the land with the building on it, and then completely defaults in his covenant to erect the building, is it possible that under any system of jurisprudence in a civilized state he would be permitted to foreclose his purchase-money mortgage for the entire amount, while the unfortunate mortgagor would be left to an action at law for his damages which he might never be able to collect?

The case of *Courson v. Canfield* (*Chancellor Runyon, 1870*), 21 N. J. Eq. (6 C. E. Gr.) 92, is cited as an authority against the position of the defendants. In that case the complainant sought to foreclose a purchase-money mortgage. When the conveyance and purchase-money mortgage were made as a part of the same transaction the grantor covenanted "that he would immediately procure releases of their title from certain persons named who were reputed to have some claim on the lands." The releases were never procured. Whether they were necessary in order to make the title of the purchaser merchantable did not appear, but the complainant insisted that he had shown "a good title and that the releases would be of no value." No effort was made to have the amount of the mortgage debt abated by an amount of money which would equal the difference between the value of the land as it stood, and the value of the land as it would have been if the releases had been obtained. The contention of the defendant was that the performance of the covenant to procure the releases was a condition precedent to the payment of the mortgage, and the conclusion of the argument was that "the payment of the mortgage should therefore be suspended until the performance" of the covenant. (Page 99.) The court rejected this argument, holding that the breach of covenant on the part of the mortgagee did not preclude him from foreclosing his mortgage because the covenants were independent. There is absolutely nothing in the report of the case to indicate that the defendant, either by his pleadings or by his proofs, set up that in case contrary to his insistment the complainant should be allowed to foreclose his mortgage, then an abatement of the

mortgage debt should be allowed on account of the complainant's breach of covenant resulting in a partial failure of the consideration of the mortgage. That aspect of the defendant's case was in no way presented to the mind of the chancellor.

The only possible question in this case, if there be one, would seem to be whether the mortgage could be assigned so as to place the assignee in a better position than the assignor with respect to the claim of abatement.

The complainant took the mortgage charged with notice of the conveyance to the mortgagor and the covenant of the Carteret Realty Company, therein contained to do this work upon the mortgaged premises. Any discussion, however, of a possible superior position of the complainant over her assignor is rendered unnecessary by the distinct allegation that she is a mere volunteer without interest and acting for the benefit of her assignor, the Carteret Realty Company.

It is important at every stage of our inquiry to bear in mind that the cross-bills show that the defendant Frank T. Morrill & Company occupy precisely the same position with respect to this land and the covenant of the Carteret Realty Company which was formerly occupied by the defendant Cyrus D. Reid. Frank T. Morrill & Company did not assume to pay the mortgage debt nor was the amount of the mortgage debt deducted from the price which that company agreed to pay. It may be conceded that Mr. Reid might have sold the land unfilled to a purchaser who took it and paid for it in that condition, and who assumed as a part of the price of the land to pay the mortgage debt. In such a case, no doubt, the owner of the equity would be obliged to submit to a foreclosure for the entire mortgage debt while the original mortgagor and covenantee would have an action against the grantor and mortgagee for the damages resulting from the breach of covenant. In such case the entire loss from the breach of covenant remains with the original mortgagor and falls upon him alone. He has been obliged to sell his land diminished in value and presumably for a smaller price because of the failure of his covenant to impart the additional value to it provided for by the covenant, while his grantee has received precisely what he bargained for. We are not obliged

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to consider various questions of importance or difficulty because of the facts distinctly alleged in the cross-bills which show that all of the equities of the defendant Cyrus D. Reid are vested in the defendant Frank T. Morrill & Company, while the defendant Reid, on account of his liability upon the bond which he gave, is interested in the enforcement of those equities on behalf of his co-defendant.

One other objection to the equity of the answers by way of cross-bill may be briefly considered. It appears that many months after the expiration of the period within which the Carteret Realty Company was to perform its covenant by making the filling in question, the defendant Frank T. Morrill & Company, being then the owner of the land, entered into an agreement under seal with the Carteret Realty Company wherein the defendant waived its claim to damages up to October 1st, 1906, "by reason of the failure of the Carteret Realty Company to perform the said covenant upon condition and in consideration that the said Carteret Realty Company would perform the provisions of said last-mentioned agreement" (which the company undertook and agreed to do), on or before October 1st, 1906. This was long after the assignment of the mortgage to the complainant. The Carteret Realty Company wholly failed to perform its covenant within the extended period provided for by the last-mentioned agreement. The complainant insists that this new agreement was a novation of the original contract, and that the result of it was to relieve the purchase-money mortgage, then in the hands of the complainant, from any claim of abatement growing out of either the breach of the original covenant of the Carteret Realty Company in its deed of conveyance, or the breach of the subsequent covenant of the Carteret Realty Company with Frank T. Morrill & Company, by which the time of performance of the covenant was extended. All the important facts, especially relating to the actual notice to the parties of circumstances and conditions affecting their respective equities, probably are not before the court. It seems to be quite sufficient to dispose of every possible claim of the complainant based on the distinction between the covenant of the Carteret Realty Company with Cyrus D. Reid, and the subsequent covenant of

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the Carteret Realty Company with Frank T. Morrill & Company to point out again that the answers by way of cross-bill allege in substance that the complainant is a volunteer without actual interest and merely representing the Carteret Realty Company in this suit in order to accomplish a fraud.

The demurrers will be overruled.

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JOHN D. VAN HORN

v.

SAMUEL R. DEMAREST, JR., and BYRON G. VAN HORN, executors  
of John C. Van Horn, deceased, et al.

[Decided November 26th, 1909.]

1. Upon a bill by the complainant against the executors of a testator and others, not for the specific performance of any contract, but for compensation or damages on account of the breach of a contract alleged to have been made by the testator whereby he legally bound himself to provide, by will or otherwise, for the accession by the complainant upon the testator's death, to a parcel of his real estate and a large share of his remaining estate—*Held*, that the rights, legal or equitable, asserted by the complainant, must be based upon a contract made by the complainant with the testator and that the testator's will is not in litigation, and *held*, after examination of the evidence, that no such contract was proved.

2. When property is transferred, or services rendered, upon the understanding that compensation is to be rendered therefor through a legacy or devise, the value of what has been so supplied is generally recoverable in an action at law.

3. Where the decree of this court, on its face, will be within its jurisdiction (*i. e.*, involve no proceeding foreign to the court, and grant no remedy with which the court is not equipped), it is generally safe for the court to retain the bill and proceed to decree, even though the whole case has turned out to be strictly cognizable at law, provided, as here, no objection is made by the parties to the litigation, and any right of trial by jury has been waived, and provided further, that the court, for its own protection, does not feel called on to dismiss the bill at the end of the hearing.

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Final hearing on bill, answers, replications and proofs, taken in open court.

*Mr. Elmer W. Demarest*, for the complainant.

*Mr. Peter W. Stagg*, for the defendants.

STEVENSON, V. C.

It is somewhat difficult to determine under what head of equity, if any, the bill of complaint in this cause can be classified. It is not a bill for the specific performance of any contract. No contract is alleged or proved which was capable of specific performance when the bill was filed, as the complainant then well knew. The bill perhaps may be best described as a bill for compensation or damages on account of the breach of a contract alleged to have been made by the testator, Garret C. Van Horn, with the complainant, by the terms of which Garret C. Van Horn legally bound himself to provide by will or otherwise for the accession by the complainant, upon the death of said Garret C. Van Horn, to a parcel of real estate and a large share of the remaining estate of the testator. This statement of the object of the bill, if substantially accurate, indicates the jurisdictional question presented by the case.

[The vice-chancellor then proceeded to show that the rights, legal or equitable, asserted by the complainant must be based upon a contract made by the complainant with his deceased uncle Garret C. Van Horn—that the will of Garret C. Van Horn was not in litigation in this case, the same having been admitted to probate after the complainant had had abundant opportunity to contest its validity; that the complainant might be conceded to be suffering a hardship on account of the change in his uncle's testamentary purposes, but that no such hardship could be recognized in this case or be made the basis of any equitable relief; that perhaps courts, as well as juries, in cases like this, where testators have changed their minds sometimes are too ready to give support to a feeble case of broken contract because of a very strong case of disappointed testamentary expectations.]



The complainant in this case, in my judgment, fails to establish any contract with his uncle, the testator, by which the complainant, upon the death of his uncle, was to receive the farm, or any portion thereof, or any share of the uncle's other estate.

[The evidence on this subject, which is very voluminous, was set forth and discussed by the vice-chancellor at length for the purposes of the argument of the cause before the court of errors and appeals. The vice-chancellor regards the publication of this discussion of mere matters of fact as unnecessary.]

The declaration of testamentary intentions and purposes even when the beneficiary of those intentions and purposes acts upon such declaration to his injury, does not necessarily constitute a contract. The lure of a legacy is often held out to attract attention and service. Personal attention and service are often assiduously rendered in the hope of a legacy. When property is transferred or services rendered upon the understanding that compensation is to be rendered therefor through a legacy or a devise, the value of what has been so supplied is generally recoverable in an action at law. *Brown St. of F.* § 118; *Duval v. Duval*, 54 N. J. Eq. (9 Dick.) 581, 588.

The defence of the statute of frauds is available to the defendants under their answer which denies the making of the contract. *Lozier v. Hill*, 68 N. J. Eq. (2 Robb.) 300, and cases cited on p. 305.

Counsel for the complainant admits that the statute of frauds would bar any action at law on the alleged contract to devise the farm. Whether parol evidence of a lost memorandum in writing can be admitted is a matter about which the decisions are said to be conflicting. *Brown St. of F.* 346. If evidence that a written memorandum once existed can satisfy the statute, it is a safe rule to insist that the proofs must be "reasonably clear and certain." 29 *Am. & Eng. Encycl. L.* (2d ed.) 875. If we assume that the letter described in the amended bill constituted a sufficient memorandum—a matter certainly open to debate—the evidence that such a letter was ever written by the testator is, to my mind, far from convincing for reasons which have been heretofore stated. But extensive discussion of this subject is unnecessary. Counsel for the complainant does not claim that any sufficient memoran-

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dum in writing has been proved in this case; his contention is that part performance of the alleged contract on the part of the complainant takes the case out of the statute. This argument, it seems to me, is fallacious because all the alleged acts of part performance are plainly referable, not to any contract to give the farm to the complainant at the testator's death, but to the contract which confessedly existed between these two parties in pursuance of which the complainant lived upon and worked the farm. It is true that the complainant for four years tilled this large farm in pursuance of a contract, but the difficulty is that nothing that the complainant so did during all this period presents the slightest indication that the contract contained the provision which is the subject of the dispute in this case. An ordinary tenant of a farm holding under a lease, verbal or written, fixing the rent which he is to pay and the use which he is to enjoy of the demised premises, cannot invoke his life and work on the farm as evidence that as a part of the contract the farm was to be conveyed to him. The rule which gives efficiency to acts in the way of part performance of a contract to take the contract out of the operation of the statute of frauds only in case those acts are plainly referable to the contract, has been fully adopted and repeatedly applied in this state. *Vreeland v. Vreeland* (Chancellor McGill, 1895), 53 N. J. Eq. (8 Dick.) 387; *Cooper v. Colson* (Court of Errors and Appeals, 1903), 66 N. J. Eq. (21 Dick.) 328. I cannot see how the defendant's occupation and cultivation of this farm and his care of these old people on the farm could possibly be deemed such efficacious part performance of this alleged contract to give the farm to the complainant without practically overruling the decision of our court of last resort in the last cited case. The court of errors and appeals, through Mr. Justice Fort, say (at p. 330): "The terms of the contract must be established by the proofs to be clear, definite and unequivocal and the acts relied on as part performance must be exclusively referable to the contract." This opinion and the cases therein cited also support the general proposition that where the services rendered as the consideration of the promise to make the devise of land are capable of complete compensation in an action at law upon a *quantum meruit*, the case stands within the operation

of the statute. In the most of the cases of the class to which the present case belongs where complainants have been successful, the court has found that the remedy on the *quantum meruit* would be inadequate; that the defendant had changed his position in life, sacrificed his prospects or in other ways subjected himself to loss of an indeterminate nature and extent so that he would suffer from hardship, or even fraud, if the land were not awarded to him. This feature is conspicuously absent in the present case.

It could hardly be gravely asserted on behalf of the complainant that what he did and suffered on behalf of his aged uncle while he was living on the uncle's farm at Closter, called for compensation to the extent of \$68,000, or even \$7,000, which counsel for the complainant estimates as the value of one-half the farm.

If we leave the statute of frauds out of view it seems to me that for reasons which perhaps have already been sufficiently exhibited, the contract which the complainant undertakes to prove in this case is not one which would be specifically enforced by a court of equity. The uncertainty as to the exact subject-matter of the contract, its improvidence, its lack of consideration moving to the testator, and the laches of the complainant in respect of the enforcement of his rights under an important part of the alleged contract would, I think, bar the complainant of relief. But as stated at the start, this is not and could not be a suit for the specific performance of any contract. It is a suit to recover damages for the breach of a contract. The complainant does not seek to have the farm conveyed to him, but, on the contrary, admits in his bill that the farm is beyond his reach. The complainant does not seek to recover a legacy but a sum of money which will compensate him for the loss of the legacy which he alleges the testator bound himself to leave him in his will. The complainant, if successful, would be theoretically placed in the same position as if the legacy had been given to him in the will, but the remedy thus secured is not technically the specific performance of a contract. Where land is the subject-matter of the contract of the testator the case may be different. Where the contract deals with a legacy the pecuniary recovery at law or in equity, in case of a breach, is no more an instance of specific performance than where the defendant is compelled by stress of

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judgment and execution at law to pay the amount of his promissory note with interest.

During the progress of the trial the question was raised by the court whether the complainant's case as alleged or proved brought it within the cognizance of equity. The defendants by their counsel raised no such point either in their answers or at any time during the progress of the trial. The answers joined issue upon the allegations of the bill and the proofs taken and the arguments submitted were all addressed to the proof or disproof of those allegations. As has been heretofore several times pointed out, this is not a suit for the specific performance of a contract because, as the bill alleged, the land had been conveyed away and placed beyond the reach of the complainant during the lifetime of the testator. The cases which establish the jurisdiction of a court of equity to retain a bill for specific performance and award the complainant damages, where prior to the filing of the bill, and without the knowledge of the complainant, the subject-matter of the contract has been put beyond reach, do not in the slightest degree support the jurisdiction of the court in this case.

The complainant's case, however, as alleged and as exhibited in the proofs should probably be regarded as exhibiting some equitable feature. If the widest claim of the complainant had been recognized and enforced, an accounting according to the insistence of complainant's counsel would seem to be necessary, and other proceedings might follow which could not be conveniently taken in a court of law. There is also authority, I think, for the proposition that the conveyance by the testator of the Closter farm to Dr. Curtiss in the spring of 1901 without the knowledge of the complainant would have been a fraud upon the complainant if the complainant had then been the equitable owner of the farm under a contract which gave him the farm absolutely upon the testator's death. If this transaction was fraudulent the defendant Byron G. Van Horn participated in the fraud.

The *scintilla* of equity is perhaps as perceptible in this case as it was in *Palys v. Jewett*, 32 N. J. Eq. (5 Stew.) 302.

See *Varrick v. Hitt* (Court of Errors and Appeals, 1903), 66 N. J. Eq. (21 Dick.) 442; *Lehigh Zinc Co. v. Trotter*, 43 N. J. Eq. (16 Stew.) 185, 204; *Seymour v. Long Dock Co.* (1869),

20 N. J. Eq. (5 C. E. Gr.) 396, 407; *Coast Company v. Spring Lake*, 56 N. J. Eq. (11 Dick.) 627; *Mertens v. Schlemme*, 68 N. J. Eq. (2 Robb.) 544, 548.

It may be that the doctrine of *scintilla equitatis* will be found to have a relation to the jurisdiction of the court of chancery analogous to that which anciently the doctrine of *scintilla juris* bore to the support of a shifting use. Where the decree of the court on its face will be within its jurisdiction, i. e., involve no proceeding foreign to the court, and grant no remedy with which the court is not equipped, it seems to me that it is generally safe for the court to proceed even though the whole case has turned out to be strictly cognizable at law, provided no objection is made by the parties to the litigation, and any right of trial by jury has been waived, and provided further that the court for its own protection does not feel called upon to turn the litigating parties away at the end of an expensive trial. In such case the doctrine that consent cannot confer jurisdiction seems to be inapplicable. The supreme court by consent of the parties cannot grant a judgment of divorce. The court of chancery with the consent of the parties at the end of an expensive litigation cannot grant a decree ousting the defendant from the office of sheriff and giving such office to the complainant. Where, however, the parties have come into a court of equity in good faith not seeking to impose on the court, and have tried their case, the mere fact that the absence of some evidence or the presence of some evidence leaves the case subject to the jurisdiction of the courts of law, ought not, I think, to induce the court on its own motion to decline to proceed to a decree. The parties to a litigation in the court of chancery have a right to stipulate evidence into the cause which the court will receive even though such evidence is essential to exhibit a case of equitable cognizance. Where the parties do not expressly supply the necessary jurisdictional facts by a stipulation, it would seem that their conduct in litigating the cause and insisting that the court shall hear and determine the same may well be deemed equivalent to such a stipulation. See *Varrick v. Hitt*, *supra*, 444. Of course, the court of chancery will guard itself against imposition and will not permit parties to try an action in equity which they know is exclusively cognizable by a court of law. No doubt

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this court has the power to reject a formal stipulation signed by all the parties to a cause if necessary to thwart such an attempted imposition. The parties themselves, however, would all be estopped to deny the existence of the facts necessary to found equitable jurisdiction which they had stipulated into the case.

I have considered with some care the question whether or not the decree in this case denying the complainant relief should be without prejudice to his right to bring an action at law either on a *quantum meruit* or for damages on account of the breach of the alleged contract or contracts between himself and the testator. This law suit, however, it seems to me, is the very thing which this court has now tried by the procurement of the complainant and with the consent of the defendant, both parties insisting that such trial should be held. If the complainant had filed a bill strictly for the specific performance of the contract to give him the farm, and on account of the statute of frauds or on account of the indefiniteness of the promise or its testamentary character specific performance had been refused, the case would have been entirely different and the complainant might properly be remanded to the law court for any action which he might be able to maintain on a *quantum meruit* for the value of any services which he rendered upon the understanding that such services would be compensated for by a devise of land. If this court has jurisdiction to decide what it has undertaken to decide in this case, it seems to me that the complainant can get all that is due him either by the action of this court or of the court of errors and appeals, without being required to start over again in an action at law. It may be again noted in this connection that it does not appear from the evidence that the complainant rendered any service or gave anything of value to his uncle, the testator, for which he was not fully and fairly compensated under the terms of the contract with reference to the occupation and management of the farm. This suit is a bold effort to recover in equity a very substantial fortune estimated by counsel for the complainant at over sixty-eight thousand dollars in cash, not one dollar of which the testimony in the case shows the complainant ever earned in any way. I see no reason why the decision of this law suit in this court and in the court of last resort on appeal should not be final

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as to all matters which a court of equity has jurisdiction to try in the case. Whatever may be the effect of the decree as an estoppel, there seems to be no reason for limiting that effect by any express reservation.

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FLORINE A. DESEUMEUR

v.

FREDERICK RONDEL.

[Decided November 19th, 1909.]

1. A testamentary disposition contained in one writing disposing of property held jointly is a "joint will;" whereas, the same document, if it refers to and deals with property held separately, would be a "mutual will."

2. In a suit for specific performance, the court should, as far as possible, settle doubtful questions of law affecting the title, and compel the vendee to take a title which the court finds free from defects so far as doubtful questions of law are concerned.

3. Where the validity of a title depends on facts which are not of such a character as to be susceptible of proof at any and all times by those who may need to prove them for their protection, the title should not be forced on an unwilling vendee in a suit for specific performance.

4. A contract of two persons on a sufficient consideration for the benefit of a third person is enforceable against the contractor.

5. An agreement between two persons on a legal consideration to dispose of their property at death in a specified manner, or to specified persons, is enforceable.

6. B., owning certain lots and personal property, and his wife, owning certain other lots, executed a mutual will, providing for the life use of all of the property by the survivor, and on the survivor's death that the executors should sell all the real and personal property of which the survivor should die seized and divide the proceeds into two equal parts, one for the benefit of the heirs of the husband, and the other for the heirs of the wife. B. died first, and the paper was probated as his will, after which the wife married another and conveyed all of the lots to her then husband. She thereafter died, leaving a new will bequeathing everything to her second husband, and he died leaving a will by which he devised the lots to C., who conveyed to plaintiff, who also received a deed

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to two of the lots originally owned by B. from his executor.—*Held*, that since the paper was signed by both parties, if based on a sufficient consideration, it might be enforceable in equity by the heirs of B. and his wife, regardless of her attempt to repudiate the same by her will. But where complainant's title to the lots depended on a question of fact, proof of which was not necessarily available to the vendee at all times, he would not be compelled to take the title in a suit for specific performance.

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Heard on bill, answer, replication and proofs in open court.

This is a bill for specific performance. The complainant charges that she is the owner in fee-simple of lots Nos. 195, 197, 199, 202, 203 and 204 on a certain map of the town of West Hoboken in this state, and that on the 25th day of January, 1909, she and the defendant, Frederick Rondel, made an agreement in writing by which she agreed to sell and convey the said lots to him for \$7,800, free of all encumbrances, except a mortgage for \$3,000 then a lien on the premises; that upon the day fixed for passing title she tendered to the defendant a deed, duly signed, sealed and acknowledged, conveying in due form of law the above-mentioned premises, which she claims are free and clear of all encumbrances excepting the said mortgage, which deed the defendant refused to accept.

The defendant admits the facts charged in the bill, and justifies his refusal by alleging that the complainant had not such a title to the property in question as to require the defendant to take it, and sets up the facts which he claims show that the complainant had not a title in fee-simple free of encumbrances excepting the mortgage aforesaid.

*Messrs. Doremus & Lecour*, for the complainant.

*Mr. Jason R. Elliott*, for the defendant.

GARRISON, V. C.

The following are the facts as proven before me:

On or before the 2d of June, 1854, Alexander Bisson was the record owner of lots Nos. 195, 197, 199, 202, 203 and 204 on a



certain map of the town of West Hoboken in this state. On the 2d of June, 1854, Alexander Bisson and Elizabeth F., his wife, conveyed to Jean Baptiste Teeson lots Nos. 197, 199, 202 and 203, and on the 8th of June, 1854, Teeson conveyed the lots just designated to Elizabeth F. Bisson. On the 20th of June, 1855, Alexander Bisson and Elizabeth F. Bisson signed a paper reading as follows:

"IN THE NAME OF GOD. AMEN. We, Alexander Bisson and Elizabeth Francoise Bisson; nee Wouters; his wife, of Weehawken, in the Township of North Bergen, County of Hudson and State of New Jersey, do hereby. make, publish and declare this our last will and testament, in manner following; that is to say: Whereas we are, at this present time in good bodily health, and of sound and disposing mind and memory. (blessed be God for the same) And whereas it is our mutual desire to make a final settlement of our whole earthly goods and possession, in the manner hereinafter directed.—And Whereas I, the said Elizabeth Francoise Bisson, am seized in fee, in my own right of certain real estate, with the buildings thereon, at Weehawken aforesaid, which was purchased with the proceeds of my lawful inheritance, as one of the heirs of my father,—and I the said Alexander Bisson, am possessed of certain personal property therein situated.

"*First.* We do hereby order and direct, our executors hereinafter named, as soon as they take upon themselves the management of our affairs. to pay and discharge all our and each of our just debts deathbed and funeral expenses.

"*Secondly.* It is our will that upon the death of either of us, the whole real and personal property, now belonging to us, or either of us, be possessed, used and enjoyed by the survivor, to have and to hold the same to me the said Alexander Bisson, during my natural life in the event of my surviving my said wife; or me the said Elizabeth Francoise Bisson, in the event of my surviving my said husband, during the period of my natural life, together with the rents, issues and profits of the said real estate and the full use, enjoyment and control thereof.

"*Thirdly.* Upon the death of the survivor of us, we do hereby order and direct our executors hereinafter named, to sell and absolutely dispose of the whole real estate and personal property of which such survivor shall die seized and possessed as aforesaid and to divide and set apart the proceeds of such sale into two equal parts, one of which shall become the property of the heirs at law of me the said Alexander Bisson, residing at Paris, in the Empire of France, or elsewhere and the other one half part, shall become the property of the heirs at law of me, the said Elizabeth Francoise Bisson, residing in the Kingdom of Belgium or elsewhere.—It being our mutual will and intention, that this disposition of our whole estate, real and personal, shall take effect upon the demise of the survivor of us the said testator and testatrix.

"*Lastly.* We do hereby nominate, constitute and appoint, Edward Dubois of Weehawken aforesaid and Frederic J. Emerich of Hoboken, executors of this our last will and testament.

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"IN WITNESS WHEREOF we have hereunto set our hands and seals the twentieth day of June in the year of our Lord one thousand eight hundred and fifty five.

"Signed, sealed, published and declared by the said testator and testatrix, to be their last will and testament, in the presence of the said testator and testatrix and in our presence, who in their presence and in the presence of each other at their request subscribed our \_\_\_\_\_ as witnesses hereto.

"BISSON [L. S.]

"E. F. BISSON [L. S.]

"Alex. Watson.

"Adolph W. Marten, City of Hudson.

"Wm. Edelstein."

This paper, on the 22d day of December, 1859, was probated in Hudson county, in this state, as the will of Alexander Bisson, he having died.

Elizabeth F. Bisson subsequently married a man who is indifferently called Vital Dallier or Dallier Vital.

On the 6th of April, 1864, Elizabeth F. and Vital Dallier made a deed to Zelig Noonan Daveau, purporting to convey lots Nos. 195, 197, 199, 202, 203 and 204.

On the 6th day of October, 1865, the last-named grantee and Jules, her husband, made a deed for the same lots to Vital Dallier.

On the 26th day of October, 1875, Elizabeth F. Dallier having died in the meantime, a paper was admitted to probate in Hudson county, in this state, as her will, which paper is dated February 25th, 1863, and by the terms of which she devises and bequeaths everything to her husband, Dallier, and makes him her executor.

On the 1st of August, 1879, the will of Vital Dallier was admitted to probate in Hudson county, in this state, by the terms of which he devised all of his property to Seraphin Clement.

On the 14th of April, 1880, Seraphin Clement made a deed to Florine A. Deseumeur for lots Nos. 195, 197, 199, 202, 203 and 204.

On the 14th of April, 1880, Frederic J. Emerich, executor of Alexander Bisson, deceased, made a deed to Florine A. Deseumeur for lots Nos. 195 and 204.

On the 25th of January, 1909, Florine A. Deseumeur (the

complainant herein), by a contract in writing, agreed to convey to Frederick Rondel (the defendant herein), for \$7,800 the six lots above described free of all encumbrance, excepting a certain mortgage.

It will be noted that at the time of the making of the paper-writing in form a will by Alexander Bisson and Elizabeth F. Bisson, his wife, on the 20th day of June, 1855, the title to four of the lots, namely, Nos. 197, 199, 202 and 203, was in Elizabeth, and the title of two of the lots, namely, Nos. 195 and 204, was in Alexander.

There is no proof before me concerning the other possessions of either the husband or wife at the date of the making of this paper-writing, or at the date of the probate of it as the will of Alexander Bisson on the 22d day of December, 1859.

The contention of the complainant is that the paper-writing just referred to was a joint or mutual will; that revocability is an essential element of a will, and that Elizabeth had the right to and did revoke the same so far as it affected her and her property.

The complainant points out that after the death of Alexander his wife, Elizabeth, married Dallier, and, through a conduit, conveyed all six lots to her husband, and subsequently, upon her death, was found to have made a will dated the 25th of February, 1863, devising all of her real estate to Dallier. She therefore claims that Elizabeth (Bisson) Dallier revoked the joint and mutual will, as they term the paper of June 20th, 1855, and transmitted the title (as they claim she had a right to do) to Dallier through whom the title comes to the complainant.

The defendant also contended that the paper of the 20th of June, 1855, was a joint or mutual will, but was *not* revocable.

Counsel did not produce to the court any direct authority, nor did the court in its own investigation find any direct authority in the State of New Jersey concerning the matter of joint or mutual wills.

There are references in some of the authorities to wills by two parties each in favor of the other, which are sometimes called "counter" or "reciprocal wills." *Duval v. Duval* (*Vice-Chan-*

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*cellor Reed*, 1896), 54 N. J. Eq. (9 Dick.) 581 (at p. 588); S. C. (Court of Errors and Appeals), 56 N. J. Eq. (11 Dick.) 375. See on the general subject, 1 *Jarm. Wills* 27; *Schoul. Wills* (3d ed.) 456; 1 *Wms. Ex.* 10, and there are many cases which deal with agreements to make wills in favor of particular persons, and holding that equity will enforce a specific performance of such agreements. *Duval v. Duval*, *supra*; particularly, collection of cases 56 N. J. Eq. (11 Dick.) 385; *Drake v. Lanning* (Vice-Chancellor Pitney, 1892), 49 N. J. Eq. (4 Dick.) 452; *Kastell v. Hillman* (Vice-Chancellor Pitney, 1894), 53 N. J. Eq. (8 Dick.) 49; *Vreeland v. Vreeland* (Chancellor McGill, 1894), 53 N. J. Eq. (8 Dick.) 387; *Eggers v. Anderson* (Court of Errors and Appeals, 1901), 63 N. J. Eq. (18 Dick.) 264; *Clawson v. Brewer* (Vice-Chancellor Emery, 1904), 67 N. J. Eq. (1 Robb.) 201.

A testamentary disposition contained in one writing and disposing of property held jointly is, I presume, precisely referred to as a "joint will;" whereas, the same document, if it refers to and deals with property held separately, would probably be more precisely termed a "mutual will."

Excepting as to questions arising out of the probate, I do not see that, in principle, there is any distinction between a single paper signed by two persons disposing of their property in a certain way, and two separate papers, each signed by one, disposing of their property in the same way. The principle upon which the courts have dealt with such dispositions of property has varied in different jurisdictions, and the following cases will be found to have dealt with it, as indicated:

In England cases will be found on each side of the question, the court, in the case of *Dufour v. Pereira* (1769), 1 Dick. Ch. 419, holding the mutual will was irrevocable after the death of one of the parties, and in *Hobson v. Blackburn* (1822), 1 Add. Eccl. 274, holding to the contrary.

*Lord Walpole v. Lord Orford*, 3 Ves. Jr. 402, on the general subject of agreements to make such wills.

*Edson v. Parsons* (1898), 155 N. Y. 555: Revocability allowed unless circumstances show valid agreement for mutual wills.

*Ex parte Day* (1851), 1 Bradf. (N. Y.) 476: Joint will revocable as a will, but enforceable in equity as a contract.

*Everdell v. Hill* (1899), 27 N. Y. Misc. 285: Agreement to execute mutual or reciprocal wills revocable during life, but the death of one of the parties fixes the obligations, which equity will enforce.

*Cawley's Estate* (1890), 136 Pa. St. 628; 10 L. R. A. 93, see note: Paper signed by both parties; one died; other took the benefits, and later made another will. Latter will admitted as hers. Supreme court affirmed and found that no contract for mutual disposition existed and no consideration. The case, however, seems to me to turn more upon the question of probate than upon the principle which would be applied in a contest between the beneficiaries under the respective wills.

*Evans v. Smith*, 28 Ga. 98: One paper signed by two, probated as a joint or double will.

*Lewis v. Scofield*, 26 Conn. 452: Similar will presented and validity upheld.

*Betts v. Harper*, 39 Ohio St. 639: After death of both signers paper was probated as the separate will of each.

*In re Diez*, 50 N. Y. 88: Joint will of husband and wife sustained.

*Schumaker v. Schmidt* (1870), 44 Ala. 454: Two friends joined in a will. Subsequently and during the life of both one made a different will. Original paper held to be a will and not a contract, and therefore revocable.

*Humane Society v. McMurtrie* (1907), 229 Ill. 519: Mother and son made joint will, giving survivor property with remainder over. Son died leaving a later individual will. Held, two persons may join in single instrument as a will, which may be probated on the death of one as a will, and again probated on the death of the other as her will. Revocable by either at any time before death, at least as to either who has taken no benefit.

*McGuire v. McGuire*, 74 Ky. 142: Mutual wills, made upon consideration, enforced in favor of beneficiaries thereunder, although one of the parties subsequently made a will revoking the mutual will.

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*Hill v. Harding* (1891), 92 Ky. 76: Joint will sustained with a dictum that it was revocable.

*Wyche v. Clapp* (1875), 43 Tex. 548: Held, agreements to make mutual wills valid. Effect of agreement not to render wills made in pursuance of them irrevocable, although such agreements may be enforced in equity against the estate of the defaulting party after his decease.

*Mullen v. Johnson* (Ala., 1908), 47 So. Rep. 584: Mutual wills between husband and wife do not raise a contractual relation, and in determining validity of one of such wills existence of the other is immaterial.

*Robertson v. Robertson* (Miss., 1908), 47 So. Rep. 675: Joint or mutual will of husband and wife could not be revoked by the widow as to the interest disposed of by the deceased husband.

*State Bank v. Bliss* (1896), 67 Conn. 317; 35 A. R. 255: Joint will creating common fund to pay debts of each and legacies to third parties not to be probated until both were dead, making each the residuary legatee of the other, was held to present an impracticable scheme, and to be without effect.

*In re Davis' Will*, 120 N. C. 9; 26 S. E. Rep. 636: Deals with the probate of a joint will after death of one maker.

*Best v. Grolapp* (Neb.), 96 N. W. Rep. 641; affirmed, 99 N. W. Rep. 837, and *Teska v. Dillbrenner* (Neb.), 98 N. W. Rep. 57: Joint will not revocable after performance by one.

*Buchanan v. Anderson* (1905), 70 S. C. 454; 50 S. E. Rep. 12: Joint will disposing of separate property may be revoked in the absence of a valuable consideration to support a contract to dispose as provided in joint will.

*Bower v. Daniel* (1906), 198 Mo. 289; 95 S. W. Rep. 347: Husband and wife, pursuant to mutual agreement, make a joint will whereby each left his or her property to the other for life, and at the death of the survivor all of the property of both to be distributed among their children. Wife dies and husband accepts benefits. He cannot thereafter revoke the will nor make voluntary conveyances contrary to its terms.

*Robinson v. Mandell*, 3 Cliff. (U. S.) 169: Where two persons agree to make mutual wills and both execute the agree-

ment, neither can revoke his will without giving notice to the other. The death of one makes the contract irrevocable as to the other. In such case equity enforces the agreement.

If the determination of the issue before me turned upon the question as to whether the paper dated June 20th, 1855, was a mutual will, and as such entitled to probate upon the death of Elizabeth the survivor, I should have to carefully analyze the authorities and extract therefrom that principle which I thought was founded upon the best reasoning, and determine the issue as thus advised; but, as I shall presently indicate, I do not think that the decision of this case should be put upon this point, and I do not therefore deem it proper for me in this case to decide that which I do not consider to be essential for its determination.

In case of specific performance in this state it has been held that the court should, to the extent to which it is possible to do so, settle doubtful questions of law affecting the title, and compel the vendee to take a title which it finds free from defect so far as doubtful questions of law are concerned. *Zelman v. Kaufherr* (Vice-Chancellor Stevens, 1909), 73 Atl. Rep. 1048.

But where the validity of the title depends upon facts which are not of such a character as to be susceptible of proof at any and all times by those who may need to prove them for their protection, our courts held that title in such case should not be forced upon a vendee. *Fahy v. Cavanagh* (Vice-Chancellor Pitney, 1900), 59 N. J. Eq. (14 Dick.) 278; *Barger v. Gery* (Vice-Chancellor Stevenson, 1902), 64 N. J. Eq. (19 Dick.) 263; *Methodist Episcopal Church v. Roberson* (Vice-Chancellor Bergen, 1904), 68 N. J. Eq. (2 Robb.) 431.

In my view this case presents such a condition. I find that the state of this title does not turn upon the settlement of a doubtful question of law, but upon the settlement of a state of facts, and such facts are not susceptible of proof at any and all times by the persons for whose protection such proof is necessary, and, in the case at bar, there are no proofs concerning the circumstances upon which the validity or invalidity of the title depends.

It is undoubtedly the law that if two people, upon sufficient

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consideration, agree to do something for the benefit of a third, such contract or agreement may be enforced as against the two contractors. It is equally well settled that, upon legal consideration, parties may agree to dispose of their property at the time of their deaths in certain specified ways or to certain specified people. The cases which hold that the courts will enforce the contract to make a certain testamentary disposition of property have already been given.

Without the necessity of considering or deciding whether the paper executed by Alexander Bisson and Elizabeth F. Bisson, his wife, on the 20th of June, 1855, was a will or not, it is perfectly clear that it expressed the understanding and agreement between those people at that time concerning the disposition of their property after their death.

If, therefore, it was founded upon sufficient consideration, a court of equity would sustain the same and decree its enforcement. Thus, it will be perceived, that it is immaterial (if the above statements of law are correct) whether the paper in question is a will, or is an instrument of proof concerning a contract or agreement. In either event, the persons to be benefited would have a cause of action respecting this property, and if they could prove that the parties (husband and wife) upon legal consideration had agreed that their respective properties should go in a certain way they could obtain an enforcement of that agreement.

It may be that during the lifetime of both Alexander and Elizabeth Bisson either could have rescinded this agreement—call it a will, or call it a contract, or an instrument of proof tending to prove a contract. But I am clearly of opinion that whatever name should be properly used to characterize this paper, it proves, or tends to prove, an agreement between the parties signing it to dispose of their property in a certain way which a court will enforce if made upon legal consideration, and if it be true and proven that at the time the paper was executed, and at the time of the death of Alexander he was possessed of personal property or real estate which was taken over and used by Elizabeth, his wife, by virtue of the probate of this paper as his will, the agreement thus evidenced has sufficient legal consideration to support it, and the rights under it will be enforced.



If, for instance, Alexander was a man of means, and Elizabeth had the four lots which were in her name at the time of the making of the paper on the 20th of June, 1855, and they made this paper, which, as they said was to make a final settlement respecting their properties, and he died first, and she took under the terms of this paper which was probated as a will all of his personal property, and either used it (if it were held that under the terms of the probated will she was entitled to do so), or used it for life (if the narrower estate was held to be vested), I cannot believe it possible that any court would thereafter permit her, under these circumstances, to rescind or repudiate her part of the bargain.

As stated in a previous portion of this opinion, there is no proof before me as to the financial condition of Alexander Bisson either at the date of the making of the paper-writing of June 20th, 1855, or at the time of his death and when his will was probated in December of 1859. I do not decide, because I do not have to and do not desire to decide, anything excepting that which is necessary, what the law would be if proofs in this case disclosed that he had no personal property of any sort at the time of the making of the paper or at the time of his death. He undoubtedly had title vested in him to the two lots Nos. 195 and 204, and Elizabeth, the wife, under the probated will, undoubtedly would have the right to the enjoyment of the rents, issues and profits from those two lots for life. She attempted much more than this, because she included them in a conveyance made by her in 1864 to an intermediary who conveyed to her new husband Dallier.

It should be constantly borne in mind that the real parties in interest under the paper of June 20th, 1855, are not before the court, and are not bound by anything herein. Therefore, even if there were proof with respect to the situation, I doubt whether it would be proper for the court to make a finding upon these proofs in favor of the merchantability of the title and force it upon the defendant.

It might well be that proofs submitted between these strangers would show one state of facts, while proofs adduced in a suit in

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which the beneficiaries designated in the paper of June 20th, 1855, were parties would show a very different state of facts.

However, I am not called upon to decide what should be done in a case in which such proofs were present. They are not present here.

Under the circumstances, therefore, it seems to me clear that this court should not force the defendant herein to accept this title. It is not shown to be merchantable in the case at bar. The paper of June 20th, 1855, if supported by legal consideration, evidences that which a court of equity will enforce. I purposely do not characterize the paper—that is, I do not hold because it is not requisite that I should, whether this paper is a will probatable upon the death of both makers, or whether it is a contract which, upon proof of sufficient consideration, will be enforced, or whether it is an instrument of proof evidencing a contract. In either or any event, it is sufficient in this suit to affect the merchantability of the title in question. It is sufficient upon which to found a *bona fide* claim on behalf of the persons in whose favor it runs, which, if supported by proofs as to consideration, &c., would entitle them to relief.

Under these circumstances, I am entirely clear that a court of equity should not hold the title merchantable and force it upon the defendant.

In the brief of the complainant there was a heading, without argument or authority, that the complainant had good title to the premises by adverse possession. The proofs upon this point are so slight as to be practically negligible, and I took occasion to inquire of counsel for both parties whether they desired to press this contention further, and they both informed me that they did not. I cannot see that there are sufficient proofs in this case to make it worth while to discuss this question.

I will advise a decree in accordance with these views.

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Cropper v. Brown.

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FANNIE W. CROPPER

v.

NELLIE BROWN et al.

[Decided December 10th, 1909.]

1. The only office of a written objection to the confirmation of a sheriff's sale in foreclosure, under act March 12th, 1880 (*Gen. Stat. 1895 p. 2111 § 45*), and court rule 205, is to urge the overthrow of the sale on the sole ground that the property did not bring the highest and best price obtainable, and an attack on the sale on any other ground must be made the basis of an independent action by bill or petition, and any effort by the purchaser to be relieved of his purchase must be by an independent proceeding, and may be by petition filed before the date fixed for the confirmation of the sale.

2. The court, on the hearing of the petition by the purchaser at a mortgage foreclosure sale to be relieved of his purchase, filed before the date fixed for the confirmation, must treat the sale as if it were, or were about to be, confirmed in the absence of anything to show that the property did not bring the best price obtainable.

3. A purchaser at a judicial sale is invested with a definite legal right, recognized and enforced by law, and of which he cannot be deprived except on some legal or equitable ground, and in those cases in which confirmation is required the right is subject to be defeated by the court's refusal to confirm.

4. Where the judicial officer observes proper legal formalities at a judicial sale, and strikes off the property to a purchaser, who thereupon signs the conditions of sale, thereby entering into a contract to purchase the property at the price named, the situation is the same as if the contract were between private parties voluntarily entering into a contract of sale and purchase.

5. A sheriff's deed of land sold at a judicial sale relates back to the time of the contract of purchase entered into by the purchaser on the officer striking off the property to him at a public sale, though the deed is not to be delivered at once, and though the purchaser is not entitled to possession until he secures his deed.

6. The legal title does not vest in the purchaser at a judicial sale until the delivery of the deed, and in the meantime the property is held in trust for him, and the beneficial ownership of the property is vested in him, so that any increase or decrease in value inures to him.

7. The purchaser at a judicial sale, who on the acceptance of his bid executes a contract to purchase on the conditions of the sale, acquires

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thereby an equitable interest in the property, so that a loss occasioned by the destruction of a building on the land occurring thereafter, and before the confirmation of the sale, falls on him.

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On petition of Thomas Gormley. Heard upon petition and affidavits.

On the 21st day of October, 1909, the sheriff of Hudson county, New Jersey, held a sale under a writ of *fiery facias* issued in the above-entitled suit. At that sale the property was struck off to Thomas Gormley, the petitioner, who bid \$2,300. The conditions of sale which he signed provided, among other things:

"*First.* The property will be sold to the highest bidder, subject to confirmation by the chancellor.

"*Second.* Ten per cent. of the purchase price shall be paid when the property offered is struck off \* \* \* in default whereof it may be put up again and sold immediately.

"*Third.* The balance of the purchase-money shall be paid on the fourth day of November, A. D. nineteen hundred and nine \* \* \* at the sheriff's office. \* \* \*

"*Fourth.* The deed will be delivered at the above time, upon compliance by the purchaser with these conditions, provided said sale is confirmed as aforesaid.

"*Fifth.* The purchaser will be held bound by the purchase, whether he attends to receive the deed and comply with the conditions of sale or not. If he does not so comply with them the property may be again advertised and sold, or the purchaser may be held liable for his bid, at the option of the sheriff. In case of re-sale at a less price than the former bid with interest and expenses, the former purchaser will be held liable for the deficiency, to meet which, the money paid by him shall be retained and applied by the sheriff.

"I have bid off the property above described for the sum of twenty three hundred dollars, and agree to comply with the above conditions of sale."

The property to be sold was accurately described in a paper annexed to and forming part of the conditions signed by the purchaser.

On the night of the day upon which this sale took place a house standing upon the mortgaged premises was destroyed by fire.

This is a petition by Thomas Gormley, the purchaser at the sheriff's sale, praying to be relieved of his bid, or to have a deduction therefrom of the amount of loss occasioned to the prop-

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erty by the fire. The petition was filed before the date fixed for the confirmation of the sale, and before the day fixed for the delivery by the sheriff to the purchaser of the deed.

*Mr. Maximilian T. Rosenberg*, for Gormley, petitioner.

*Mr. William R. Barricklo*, for the complainant.

*Mr. Peter Stillwell*, for David and Nellie Brown, defendants.

GARRISON, V. C.

The fact that this petition is filed before the date fixed for the confirmation of the sale does not, in my view, affect the principle which should be applied in the decision of the case.

This is a foreclosure suit, and the statute requiring confirmation is the act of March 12th, 1880. *Gen. Stat. p. 2111 § 45*. This statute and rule 205 of this court concerning the same subject-matter recently received judicial construction in this court in the case of *Oakley v. Shaw (Vice-Chancellor Walker, 1908)*, 69 *Atl. Rep.* 462. In that case the court refers to many of the cases upon this subject-matter, and reaches the conclusion "that the only office of a written objection to the confirmation of a sheriff's sale in foreclosure, under the act of March 12th, 1880, and rule 205 of this court, is to urge the overthrow of a sale upon the sole ground that the property did not bring the highest and best price that could be obtained for it in cash, and that an attack upon the sale on any other ground must be made the basis of independent action either by bill or petition." See, also, *Bethlehem Iron Works v. Philadelphia and Seashore Railroad Co. (Chancellor McGill, 1892)*, 49 *N. J. Eq. (4 Dick.)* 356, and *Fleming v. Fleming Hotel Co. (Vice-Chancellor Bergen, 1905)*, 70 *N. J. Eq. (4 Robb.)* 509. Any effort on behalf of the purchaser at the sale to be relieved of his purchase must be by some independent proceeding and not by mere objections to confirmation, and may be by petition.

— Since the statute in question, which requires confirmation, has been judicially held to have been enacted for the purpose of enabling the court before the sale is carried out to be assured

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that the property has brought the best and highest price obtainable in cash at the time of the sale, the court, in this case, must treat this sale as if it were, or were about to be, confirmed, and as it would treat either a confirmed sale or one that required no confirmation, because there is nothing before me to show that the property did not bring the price obtainable in cash at the time of the sale, and nothing to show that the sale was not properly conducted and should not therefore be confirmed.

The practice of the English court of chancery in opening sales whenever an offer of a larger amount for the property was made was discarded and not adopted in this state. *Morrisse v. Inglis* (Court of Errors and Appeals, 1889), 46 N. J. Eq. (1 Dick.) 306 (at p. 309); *Rogers v. Rogers Locomotive Co.* (Vice-Chancellor Emery, 1901), 62 N. J. Eq. (17 Dick.) 111 (at p. 118 et seq.); *Fleming v. Fleming Hotel Co.*, *supra*.

The English practice treats the bidder in the light of one who has made an offer to be reported to the court, and if a larger offer is made by another the sale to the former is not confirmed. This is so radically different from our practice that the English authorities will have to be viewed with great caution, particularly those which lay stress upon the effect of confirmation.

There are some cases in England which hold that there is no contract until the court has confirmed the bidding in the master's office, but even these cases are doubted by later decisions, and it would not seem, from a consideration of the English authorities, that such was now the rule there. However that may be, after the courts in England have once determined that the contract of sale was complete, whether they fixed that period at the time of the sale or at the time of the confirmation, they then applied the rule concerning the rights and responsibilities of the parties which, I think, is the correct rule, and which I shall formulate and state hereafter.

*Ex parte Minor*, 11 Ves. Jr. 558: The estate of a lunatic was sold before the master on the 9th of February, 1805. On the 26th of February there was a petition that the report of the master might be confirmed. On the 28th of February there was a fire, and this was a petition by the purchaser to have the value of the premises destroyed ascertained and the amount deducted

from the purchase-money. The argument on behalf of the petitioner was that it was necessary to distinguish this case from those cases in England which are cited in his brief and which hold that from the date of the contract of purchase the purchaser was, in equity, the owner to all intents and purposes, and should gain or suffer, as the case might be, by changes in the subject-matter of the sale, because in this case the highest bidder could not be considered the owner until the confirmation of the report, and if the premises, by accident, were increased in value, as by the discovery of a mine, the court would require an increase of price (citing cases).

The contrary argument was that, referring to all legal and equitable consequences attaching to sales, the court could not properly distinguish sales before masters from sales in any other manner, and that from the time the purchaser signs the master's book, and has the report declaring him the purchaser, all those consequences must follow.

Lord-Chancellor Eldon, upon the argument, said: "The question must depend upon the point, What is the date and time of the contract at which it can be said to have been complete? Is the bidding in the master's office the contract between the court and the bidder, or only an authority to the master to tell the court that, if the court approves, the court may make a contract with him (the purchaser) upon the terms proposed?" Subsequently, his lordship determined that the loss must fall upon the vendor.

The same judge, in the case of *Anson v. Towgood*, decided in 1820, about fifteen years after the previous case, said, concerning a sale before a master: "Can anything turn upon the report not being confirmed? There was a case about a house being burnt down before the confirmation of the report (*Ex parte Minor*, 11 Ves. 559), but if the tenant for life had died the same night, must not the purchase-money have been paid? The report, I think, when confirmed, must have relation back to the purchase, and the contract, I apprehend, was made the moment that the purchaser's name was entered in the master's book."

And in *Millican v. Vanderplank*, 11 Hare 135, decided in 1853, the vice-chancellor, Sir W. Page Wood (at p. 140), says:

"There are material distinctions between a sale by private contract and a sale by auction before the master in the ordinary view. Sales by auction before the master are of a peculiar character. The person who is the highest bidder knows that he is not the purchaser until the confirmation of the report, and that, until such confirmation, any stranger may apply to the court to open the biddings, and that, upon such an application, the party making it does not necessarily become himself the purchaser, \* \* \* and the property is again put up to auction. All persons bidding at sales before the master are aware that they are of this peculiar character. I cannot, however, concur in the argument which was addressed to me in this case, that a distinction between sales by auction and private contract was that the purchaser was not bound in the former case until the confirmation of the report.

"Lord St. Leonards, in *Vesey v. Elwood*, 3 Dru. & War. 74, after considering the cases of *Ex parte Minor*, 11 Ves. 559, and *Anson v. Towgood*, 2 Jac. & W. 637, came to the conclusion that the purchaser was bound before the confirmation of the contract by the court. He held this in the strongest case which can be supposed, in which a life dropped in the meantime before the purchaser could, according to the practice of the court, have confirmed the report."

In the case of *Robertson v. Skelton*, 12 Beav. 260, the master of the rolls, Lord Langdale, held "By the established rule of the court the purchaser is to be considered, in fact, as the owner of the estate from the date of the order confirming the report, and any deterioration of the property arising from accident, as by fire, without the fault of the vendor, falls upon the purchaser." In this case two houses were sold by auction in a creditor's suit. By the conditions of sale the purchaser was to get the report confirmed before the 8th of August, 1846, and pay his purchase-money into court before the 12th of November, 1846, and be let into possession as from the 29th of September, 1846. After the confirmation, but before he paid his purchase-money and obtained the conveyance and possession, part of the property fell down and had to be repaired. It was held that the loss fell upon



the vendee. No point, of course, was involved in this case as to the matter of confirmation.

In New Jersey the courts have always endeavored to give the greatest stability to judicial sales, and upheld them unless there was some strong, equitable or legal reason to the contrary.

“A purchaser at an official sale becomes invested with a fixed and definite legal right, which is recognized and enforced by the law, and of which he cannot be deprived except upon some legal or equitable ground.” *Chamberlain v. Larned* (Chief-Justice Beasley, *Court of Errors and Appeals*, 1880), 32 N. J. Eq. (5 Stew.) 295; see, also, cases cited in *Palladino v. Hilpert*, 72 N. J. Eq. (2 Buch.) (at p. 278 et seq.).

This right of the purchaser, in those cases in which confirmation is required, is fixed, though defeasible, and is subject to be defeated if the court refuses to confirm the sale, but, notwithstanding this, the right of the purchaser and the correlative rights of the judicial officer are established at the time of the sale and by the contract then made.

In my view there is no real distinction in this state in respect to the principles to be applied respecting the rights of the parties between judicial sales and other similar sales voluntarily made between parties.

The judicial sale is made by the officer in whom the law has lodged the power to make the sale. The fact that it is *in invitum*, and that the officer is only exercising a power and has not title, does not, in my view, in any way alter the rules to be applied when the contract has once been made.

Since there exists a parallel line of decisions which are contradictory and confusing upon this point, it will be necessary to consider them in order to reach a clear determination and conclusion.

In *Den v. Steelman*, 10 N. J. Law (5 Halst.) 193, Chief-Justice Ewing, in the supreme court, held that the substantial part of a judicial sale was the delivery of the deed by the sheriff to the purchaser, and that everything related to that; and he further held that under our law the exercise by the sheriff of the power of sale vested in him did not become effective until he delivered the deed, and that, therefore, there was no relation

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back to the date of the sale (when the contract between the purchaser and the sheriff was entered into). He therefore held that the law which would obtain as between a voluntary vendor and vendee did not apply as between sheriff and purchaser. The decision in the case involved these facts: A sale under a judgment by a sheriff who made a contract with A as purchaser. Before the sheriff's deed was delivered to A a judgment was recovered by B against A. Under B's judgment against A, A's interest in the premises purchased by him at the sheriff's sale aforesaid was attempted to be sold, and the contest was between the respective titles. The court held that whatever right A, the purchaser at the first sale, had, it was not such as was subject to execution under a writ of *fiery facias* issued on a common-law judgment.

Since there was no provision in any of the statutes which subjected an equitable estate to levy and sale under a common-law judgment, this decision seems to me to be unexceptionable, but the reasoning of the chief-justice concerning these other matters does not seem to me to have been necessary for the decision of the case.

His reasoning, however, was adopted in other cases. *Bloom v. Welsh* (*Supreme Court*, 1858), 27 N. J. Law (3 Dutch.) 177; *Disborough v. Outcalt* (*Chancellor Vroom*, 1831), 1 N. J. Eq. (Saxt.) 298; *Ketchum v. Johnson's Executors* (*Chancellor Haines*, 1843), 4 N. J. Eq. (3 Gr. Ch.) 377; *Pearman v. Gould* (*Chancellor Runyon*, 1886), 42 N. J. Eq. (15 Stew.) 4, and particularly by Chancellor Magie in the case of *Thompson v. Ramsey* (1907), 72 N. J. Eq. (2 Buch.) 457, with which I shall deal hereafter.

Parallel with these cases, and not adverting to them, there were the decisions in *Morse v. Hackensack Savings Bank* (*Court of Errors and Appeals*, 1890), 47 N. J. Eq. (2 Dick.) 279; *Wimpfheimer v. Prudential Insurance Co.* (*Vice-Chancellor Emery*, 1898), 56 N. J. Eq. (11 Dick.) 585; *First National Bank v. Thompson* (*Vice-Chancellor Stevens*, 1900), 61 N. J. Eq. (16 Dick.) 188, and *Carpenter v. Shanley* (*Vice-Chancellor Garrison*, 1909), 73 Atl. Rep. 64, where exactly the opposite is held, namely, that the substantial thing in a judicial sale is the

contract made at the time of the sale between the officer and the purchaser, and that the delivery of the deed is a mere ministerial act on the part of the judicial officer; a mere formality, and that when it is delivered it relates back to the date of the sale.

The sheriff or other judicial officer is held to be the agent appointed by law for the person or persons whose rights are to be disposed of (*Brady v. Carteret Realty Co. (Court of Errors and Appeals, 1904), 67 N. J. Eq. (1 Robb.) 641*), and the statute prescribes that the deed of conveyance which he shall give

"shall transfer to or vest in the said purchaser as good and perfect an estate to the premises therein mentioned as the person, against whom the said writ or writs of execution were issued, was seized of or entitled to at or before the said judgment; and as fully, to all intents and purposes, as if such person had sold the said lands, tenements, hereditaments and real estate to such purchaser and had received the consideration money, and signed, sealed and delivered a deed for the same."

By what seems to me to be a perfect analogy, <sup>it</sup> must therefore be held that when this legal agent, namely, the judicial officer, observing proper legal formalities, at a public sale strikes off the property to a purchaser, who thereupon signs the conditions of sale, thereby entering into a contract to purchase the premises named at the price named, the situation is exactly the same as if the contract were between private parties. The sheriff is vested by law with the power, on behalf of the persons against whom he holds the writ, to sell the property. This he does, and a written contract satisfying the statute of frauds is then made. I cannot perceive any reason why the same principles should not control the parties with respect to this contract as would control private parties voluntarily entering into a similar one.

Nor can I perceive why, when the deed which the judicial officer subsequently gives is delivered, it should not relate back to the time of the contract which undoubtedly, in my view, is the substantial thing in the transaction. The fact that the deed is not to be delivered at once, and that, in the meantime, under the law, the purchaser is not entitled to possession, and is not

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entitled to possession until he secures his deed, does not affect the situation as equity views it. §

Chancellor Magie, in the case of *Thompson v. Ramsey, supra*, reverted to and depended upon the doctrine of *Den v. Steelman, supra*, and refused to adopt the doctrine enunciated by Mr. Justice Depue in *Morse v. Hackensack Savings Bank, supra*, because he held that the doctrine enunciated in the last-named case that the contract between the judicial officer and the purchaser was the substantial thing, and the delivery of the deed a mere formality which, when delivered, related back to the date of the contract, was not necessary to the decision of that case, and was therefore *obiter*. The chancellor thereupon refused to consider *Morse v. Hackensack Savings Bank* as a precedent, and discarded the reasoning therein in favor of the reasoning of Chief-Justice Ewing in *Den v. Steelman*.

I do not think it is clear by any means that the expression of opinion by Mr. Justice Depue in *Morse v. Hackensack Savings Bank* concerning this matter was *obiter*, and, in my view, it was necessary for him to decide the point in question to reach the decision which the court did upon the facts in that case. In that case Terhune was the executor of his father's will and was also one of the devisees thereunder. Upon a judgment obtained against him his interest as heir was set up and sold by the sheriff on the 29th of August, 1888, to the bank. On the 22d day of September, 1888, Terhune, exercising the power of sale vested in him by the will, sold all of the lands of which his father was seized to Morse and immediately gave him a deed which was immediately recorded. The sheriff's deed was not delivered to the bank (the purchaser at the sheriff's sale) until five days thereafter, namely, on the 27th of September, 1888. The contest was between the bank and Morse.

A perfectly familiar principle was involved in the suit, namely, that the title which descended to the heir was subject to be defeated by the exercise by the executor of the power of sale contained in the will. That power of sale, when executed, related back to the date of the death, when the will became operative, and cut out the right of the heir and those who claimed by, through or under the heir.

Of course, if the executor had exercised the power of sale before the rights of the bank had attached—that is to say, before those who claimed under the heir had any rights—there would have been no occasion for any extended discussion, and no issue calling for the application of any principle excepting the perfectly familiar one above mentioned. But it is obvious, from the opinions in the court of chancery (46 N. J. Eq. (1 Dick.) 161) and in the court of errors and appeals, *supra*, that other issues were in the suit and were determined.

The bank took the ground that, notwithstanding the familiar principle above alluded to, it was not operative in this case, because, having acquired their title through the heir before the exercise by the executor of the power of sale, they had the right to hold the title as against the purchaser at the executor's sale on account of certain equities which they urged. In the court of chancery this claim was held to be good. In the court of errors and appeals it was first held that, under the law, the purchaser at the sheriff's sale did convey a title prior in point of time to that of the purchaser at the executor's sale, and therefore was in a position to urge the equities in his behalf which he had raised and which had been considered in the court of chancery.

The investigation of the court of errors and appeals into these issues resulted favorably to the defendant, and resulted in a reversal of the court of chancery.

But upon the point which we are considering, the court of errors and appeals affirmed the position taken in the court of chancery. Mr. Justice Depue upon this point held "The date of the delivery of the sheriff's deed is a circumstance of no importance. A purchaser at a sheriff's sale acquires by the act of purchase a right to a conveyance of the premises in pursuance of the sale. The delivery by the officer of a deed is a mere ministerial act which the officer is required to perform to consummate the sale and vest in the purchaser a title in compliance with the law under which the sale was made.

"The sheriff's deed, when delivered, has relation back to the time of the sale of which it is the consummation. \* \* \*

As a conveyance of the property the executor's deed (which, it

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will be recalled, was made, dated, delivered and recorded September 22d) was, in legal effect, subsequent in point of time to the sheriff's deed to the complainant (which, it will be recalled, was made, executed and delivered on the 27th day of the same September)."

The cases which have followed this decision and adopted its finding upon this point have been given, *supra*.

I incline to the opinion that this case is a precedent. I also incline to the opinion that, upon reason as well as upon authority, the doctrine therein enunciated is the correct one.

If I am correct upon this matter, the result is that the confusion both of decision and reasoning arising out of the contradictory nature of the respective cases above mentioned is dissipated, and our rule is that the giving of the sheriff's deed is a mere ministerial act and is not the substantial part of a judicial sale, and, when given, relates back to the sale and the contract there made, with the result, likewise, that such contract is then to be treated, as previously stated, just as a similar contract voluntarily entered into between private parties concerning the same subject-matter would be treated.

That this latter is the case seems to me to be borne out by those authorities which hold that upon such a contract an action at law will lie by either party against the other for a breach (*Townshend v. Simon* (*Supreme Court*, 1876), 38 N. J. Law (9 Vr.) 239; *Smith v. Cunningham* (*Vice-Chancellor Emery*, 1905), 69 N. J. Eq. (3 Robb.) 622), or a bill in equity will lie by either party for the specific performance of the contract. *Ely v. Perrine* (*Chancellor Pennington*, 1841), 2 N. J. Eq. (1 Gr. Ch.) 396; *Bowne v. Ritter* (*Chancellor Runyon*, 1875), 26 N. J. Eq. (11 C. E. Gr.) 456.

The whole matter is so well expressed by Chief-Justice Depue in the case of *Townshend v. Simon*, *supra*, that a quotation will be useful. Commenting upon cases which hold a contrary doctrine to the one which he approved, and with respect to one of them which held that the signing of conditions of sale was a mere submission to the authority of the court, and not a contract either with the sheriff or the plaintiff, he said, 38 N. J. Law (9 Vr.) (at p. 243): "The argument by which this con-

clusion was reached was that the memorandum lacked the essential elements of a contract, not only in parties but also in mutuality and consideration. Inasmuch as the legal results of a purchase at a sheriff's sale are an obligation on the part of the officer to convey, and on the part of the purchaser to accept a conveyance and pay the purchase-money, it is difficult to perceive wherein the undertaking is deficient in either mutuality or consideration. The duty of the officer to make conveyance of the lands on his acceptance of the bid of the successful bidder, and his power to transfer to the purchaser the title he is selling, are as much a consideration as his ability to pass the property and chattels on the sale of personal property. The only difference is that property in chattels passes by the sale, whereas, on a sale of lands, a deed is necessary to convey the legal title. The rights of the buyer, in both instances, are fixed when the bid is accepted. Whatever else is necessary to complete the transaction is merely a compliance with the forms of passing title to land. Each party, it is admitted, may compel performance by the other by the intervention of the court out of which the process issued. A more decided illustration of consideration and mutuality of a contract can scarcely be found. The same elements of mutuality and consideration are present in a sale by an officer having power to sell and ability to make conveyance, as attend a sale by an owner at public auction." And on page 244: "The notion that the contract is with the court is too fanciful to merit much consideration. It is regarded as such a contract as may be made the ground of a bill for specific performance in the name of the officer."

And in those cases in which the court itself is requested by the purchaser to relieve him of his purchase, the matter is dealt with as if it were an action of specific performance, and the same principles are applied. *McCarter v. Finch* (Vice-Chancellor Pitney, 1897), 55 N. J. Eq. (10 Dick.) 248; *Campbell v. Parker* (Vice-Chancellor Pitney, 1900), 59 N. J. Eq. (14 Dick.) 342.

In my view, therefore, the correct rule to be applied in our jurisdiction is that the purchaser at a judicial sale enters into a contract with the officer to which the same principles should

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be applied which are applicable to a similar contract between private parties voluntarily entered into. And the fact that by the terms of the contract the purchaser is not entitled to possession until a future date does not in any way alter the legal or equitable rights of the parties.

The legal title does not vest in the purchaser until the delivery of the deed, but in the meantime it is held in trust for him. Since he has stipulated that he is not to receive possession until a future date, namely, the time when the deed is to be delivered to him, he is not entitled to the fruits of possession, which are the current avails of the land. There are numerous cases, which I shall not stop to cite, which hold that until he is entitled to possession he is not entitled to such avails. But excepting with respect to the time when he is entitled to possession and the fruits of possession, the contract vests the beneficial ownership of the property in such purchaser, and any increase of value or decrease therein inures to him. 7

In other jurisdictions the rule is, in some, as above stated, and in others, otherwise by reason of their statutes, and in some, it is otherwise by reason of the different view which the court in question takes of the situation arising out of a judicial sale.

Much care must, of course, be exercised in reading cases from other jurisdictions, to observe the extent to which they are affected by statute. Many of the cases will be found gathered in the note to *Robertson v. Van Cleave*, 15 L. R. A. 68; see, also, *Yeazel v. Einspahr*, 24 L. R. A. 449, and *Vance v. Foster*, 9 Bush (Ky.) 389. 8

And in disposing of a case arising under the laws of Nebraska—the courts of which hold that the confirmation of the sale is necessary to its completion—the supreme court of the United States, in the case of *Woodworth v. Northwestern Insurance Co.*, 185 U. S. 354; 46 L. Ed. 949, said: "The claim in the case at bar is for the rents and profits of the land, which accrued and were collected by the mortgagor after the entry of the order of confirmation of the sale. Upon general principles, independent of the decisions of the courts of Nebraska, we would be constrained to hold that, under the circumstances present in the case at bar, \* \* \* the purchaser acquired, as against the



mortgagor, by relation, both the legal and equitable title to the land purchased, at least as of the date of the order of confirmation of the sale."

And in the brief of counsel in that case there will be found many cases to support the principle there enunciated that the general equitable rule \* \* \* carries the title back by relation to the date of the sale so as to award to the purchaser the intermediate rents. And the case of *Woodworth v. Northwestern Insurance Co.*, above cited, was followed in *Brown v. Northwestern Insurance Co.*, 119 *Fed. Rep.* 149; see, also, *Missouri Valley Land Co. v. Barwick*, 50 *Kan.* 61; 31 *Pac.* 685.

I am of opinion, therefore, as I have heretofore stated, that under our decisions and statutes the proper holding is that the judicial officer and the purchaser at a foreclosure sale (and probably this applied to all similar judicial sales) stand in a similar position to parties who have contracted in writing for the purchase and sale of real estate.

If this is so, the disposition of the precise point in the case at bar is not difficult.

The note to *Bowen v. Lansing*, 57 *L. R. A.* 643, gathers up the cases from many of the jurisdictions concerning the rights of vendors and vendees in land contracts, and the conclusion to that note (p. 654) so well states what the cases hold that I shall quote it:

"Under the familiar doctrine that equity considers as done that which was agreed to be done, a contract for the sale of land operates as an equitable conversion. The vendee takes an equitable title, and his interest under the contract becomes realty; in case of his death before the conveyance is made the title descends to his heirs; he is entitled to all benefits attaching to the property, and must bear all losses, unless the contract shows a contrary intention on the part of the parties; he may execute a valid mortgage or deed of the property; and is entitled to the usual benefits attaching to the ownership of the property, subject, however, to the rights of the vendor, who holds the legal title as security for the payment of the purchase-money.

"Conversely, the vendor's interest constitutes personalty, and on his death, is distributable as such. He holds the legal title as trustee for the purchaser and as security for the payment of the purchase-money. He cannot give a valid deed or mortgage of the property to one having knowledge of the vendee's equities, though he may transfer his interest under the contract. The decisions are conflicting as to whether a judg-

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ment against him constitutes a lien on the property; some hold that it does not constitute a lien, while others hold that it constitutes a lien on his interest in the property which may be sold under the judgment.

"The doctrine will not be applied where it is apparent from the contract that the parties intended that it should not operate as an equitable conversion.

"Neither will it be applied where the contract is one the specific performance of which cannot be enforced.

"The conversion takes place at the time of the execution of the contract, even though the purchaser does not take possession or pay the purchase price; though in some cases where the decisions were based on the language of the particular contracts, it was held that the equitable title did not pass until the performance of certain conditions."

And in judicial sales it should be noted that we are not embarrassed by the decisions which hold that the equitable title will not be held to have passed in those cases where the vendor was not in a position to make a good title, because, in judicial sales, the judicial officer is always in a position to make such title as he is bound to give.

Since the precise point involved in the question before me is: Upon whom should fall the loss occasioned by a fire occurring after a contract of sale and before the delivery of the deed, I would particularly direct attention to that portion of the above note which appears on page 647 under the sub-title *I. d.*, and see, also, the authorities cited in *29 Am. & Eng. Encycl. L.* (2d ed.) 713.

That the conclusions reached by the author of this note are fully justified by the course of decision in our own state will be found by consulting the following authorities in addition to those cited in the note above referred to: *Miller v. Miller* (Chancellor Runyon, 1874), 25 N. J. Eq. (10 C. E. Gr.) 354; reversed, 27 N. J. Eq. (12 C. E. Gr.) 514, but not on this point; *Keep v. Miller* (Chancellor Runyon, 1886), 42 N. J. Eq. (15 Stew.) 100; *Coles v. Feeney* (Vice-Chancellor Pitney, 1894), 52 N. J. Eq. (7 Dick.) 493; *Canfield v. Canfield* (Vice-Chancellor Stevens, 1901), 62 N. J. Eq. (17 Dick.) 578; *Marion v. Wolcott* (Chancellor Magie, 1904), 68 N. J. Eq. (2 Robb.) 20.

In *Grunauer v. Westchester Fire Insurance Co.*, 3 L. R. A. (N. S.) 107; 62 A. R. 418; 72 N. J. Law (43 Vr.) 289, it was

held that "undoubtedly such contract creates the relation of trustee and *cestui que trust* between vendor and vendee. It produces in equity a complete transition of the vendor's holdings from real to personal, and gives the vendee the equitable ownership. After such contract the vendor's interest is no longer real estate, and the unpaid purchase-money is personalty, and goes to the vendor's personal representative in case of his death. \* \* \* Although the vendor still retains the legal title to the land agreed to be sold and conveyed, he thereafter holds it only as a trustee for the vendee, who becomes the equitable and beneficial owner. \* \* \* Under such a contract and surrender of possession the vendee becomes the beneficial owner, and loss or destruction of the property falls upon him and not upon the vendor, and many cases decided in other jurisdictions directly hold such contract (either with or without transfer of possession) to be a breach of the condition in question." (Citing cases.)

The "condition in question" had reference to the condition in an insurance policy upon the premises issued to the vendor, which provided

"that if any change \* \* \* takes place in the interest, title or possession of the subject of insurance \* \* \* the entire policy shall be void."

It has been consistently held that by a completed contract of sale the vendee acquires an insurable interest in the premises, and this is so, irrespective, in my view, of whether or not he has taken possession. It is not the fact of possession which creates the beneficial equitable right in him; it is by force of the contract. Both the vendor and the vendee have insurable interests. See *Grunauer v. Westchester Fire Insurance Co.*, *supra*; *Marion v. Wolcott*, *supra*; *Rich. Ins. L.* 295 § 237. See, also, the following cases and notes thereon: *Williams v. Lilley*, 37 L. R. A. 150; *Phinizy v. Guernsey*, 50 L. R. A. 680; *Nanquin v. Texas, &c., Co.*, 58 L. R. A. 711; *Rawson v. Bethesda Church*, 6 L. R. A. (N. S.) 448; *Zenor v. Hayes*, 13 L. R. A. (N. S.) 909.

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I am therefore of opinion, in the case in hand, that the loss occasioned by this fire falls upon the purchaser at the sheriff's sale. The result is that the petition of such purchaser must be dismissed, with costs, and the sale be confirmed. H

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SOPHIA HOWELL, substituted administratrix, &c.,

v.

JEREMIAH STEELMAN et al.

[Decided December 14th, 1909.]

1. The court in construing a will must search for testator's intention in the light of the facts, placing itself as nearly as possible in his position.

2. Testator gave a nominal sum to each of his five children, gave the balance to his wife for life, or during widowhood, with a gift over, on her death or remarriage, to his "surviving heirs" equally, and provided that charges against his "heirs, their husbands or wives as contracted \* \* \* by them with me," should be deducted from their share. A daughter, whose husband was indebted to testator, died before testator, leaving children.—*Held*, that the words "surviving heirs" meant surviving children, and referred to such of the testator's children as should be surviving at the date of their mother's death or remarriage, and that the children of the deceased daughter did not take.

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Heard on bill, answer, replication and proofs in open court.

This is a bill filed to procure the construction of the will of Andrew S. Godfrey and for directions with respect thereto. The facts sufficiently appear in the opinion.

*Messrs. Melosh & Morten*, for the complainant.

*Messrs. French & Richards*, for Andrew G. Steelman et al., children of Jeremiah and Kate Steelman.

*Mr. Joseph L. Thomas, for Jeremiah Steelman.*

GARRISON, V. C.

Andrew S. Godfrey, the testator, was a sea captain living at Tuckahoe, Atlantic county, New Jersey. On the 11th day of July, 1885, he made his will. At that time his wife was living, as were also five of their children, Theophilus W., Anna M. (Bailey), Hannah (Campbell), Sophia (Howell) and Kate (Steelman). Prior to this time, and as the result of transactions which need not be detailed, Jeremiah Steelman (the husband of Kate, who was one of the daughters of the testator) was indebted to the testator in about \$2,000.

By his will the testator gave to each of his five children, by name, the sum of one dollar. He then gave to his wife all the balance of his estate during her natural life, or during the time she remained his widow. He then provided

"in the event of my wife's death or should marry again, it is my will and I do order that whatever there may be of my worldly possessions, real, personal or mixed, shall be equally divided among my surviving heirs, after assigning to her her right of dower as my former widow.

"And it is my will and I do order that wherever there may be found any obligations, or charges be made and substantiated by documentary evidence or otherwise proven against my heirs their husbands or wives as contracted or executed by them with me, that the same be first deducted from their share of my estate, but no interest shall be charged on any such charges or debts against them."

Kate Steelman died on the 22d day of October, 1888, leaving her husband, Jeremiah, and four children surviving her. The other four children of the testator all survived their father. Andrew S. Godfrey, the testator, died in January, 1899. Hannah C. Godfrey, the widow, died on the 30th day of April, 1907.

The question to be determined is, What did the testator mean when he provided that after the widow's interest ceased the property should be divided equally among "my surviving heirs?"

I think it perfectly plain that what he meant was "children," and that the phrase, if written so as to express his exact meaning, would have read "my surviving children."

Of course, no one is an heir to the living, and when the tes-

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tator used the words "my surviving heirs" he was speaking with reference to some persons who were to be surviving at the time that the life estate or intermediate estate of the widow fell in. It was this class, then surviving, that he desired to provide for.

We must search, therefore, his intention in the light of such facts as we have, placing ourselves, as nearly as we can, in his position, so as to get his point of view as nearly as possible. At the time that he drew his will, as heretofore stated, it is shown that the husband of Kate Steelman, one of his daughters, was indebted to him in a considerable sum of money. It was shown that he had at that time, including Kate, five children. Kate died before he did, but he did not change his will, which strongly evidences to my mind that in using the words "surviving heirs" he meant, as before stated, "surviving children."

From the clause of the will above quoted, providing for the charging of obligations against the interests of his heirs, another strong indication of his meaning is obtained. Therein he provides that if there are any obligations against "my heirs their husbands or wives as contracted or executed by them with me," the same are to be first deducted "from their share of my estate." It is quite evident that he uses the word "heirs" here instead of "children," and what he meant to say was that

"if any of my children, or the husbands or wives of any of my children, have borrowed any money from me, before such surviving child of mine shall receive his or her share, the debt due me from such child, or from the husband or wife of such child, shall first be deducted."

This provision was evidently put in the will in view, partly if not wholly, of the fact that Jeremiah Steelman, the husband of one of these children, Kate, was indebted to him in a considerable sum of money, and he did not propose that the share which Kate would get, if she lived to the period of distribution, should go to her in its entirety while her husband owed the testator this large sum of money.

As before stated, Kate died during the lifetime of her father, the testator, and unless the word "heirs" is held to mean "children" the result is that the children of Kate inherit, and there is no deduction from their share because the debt due the tes-

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tator was not contracted by the husband or wife of any of the "heirs."

If the testator did not mean "children" when he said "heirs," he certainly would have changed his will after Kate died, because it is inconceivable that he should first draw a will which, upon its face, bears evidence of the intention to safeguard the estate against debts contracted with him by his children, and then, when the situation was altered by the death of one of the children, leave the will unaltered so that in the administration of his estate exactly the opposite of his intention would result.

The courts have frequently held that the word "heirs" or "surviving heirs" meant "children." *Demarest v. Hopper* (*Court of Errors and Appeals*, 1850), 22 N. J. Law (2 Zab.) 599 (at p. 611); *Bruere v. Bruere* (*Vice-Chancellor Van Fleet*, 1882), 35 N. J. Eq. (8 Stew.) 432 (at p. 434); *Davis v. Davis* (*Chancellor Runyon*, 1884), 39 N. J. Eq. (12 Stew.) 13 (at p. 14); *Eldridge v. Eldridge* (*Chancellor Runyon*, 1886), 41 N. J. Eq. (14 Stew.) 89 (at p. 91); *Müller v. Metcalf* (*Supreme Court, Connecticut*, 1904), 53 Atl. Rep. 748; note to 2 L. R. A. 457.

The result is that the will should be construed as above stated, and the substituted administrator should be directed to distribute the estate in accordance with such construction.

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IDA G. SHEARMAN et al.

v.

ALPIN J. CAMERON, executor, &amp;c., et al.

[Decided December 18th, 1909.]

1. Where a testator nominates his son as an executor, and also trustee of testator's interest in a partnership in which the son is a partner, and it is the son's duty, under the will, as executor, with the surviving partners, to determine testator's interest in the partnership, and, as trustee,

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to agree with the surviving partners as to the terms on which testator's interest shall remain in the business for a given period, suit against the son by the beneficiaries under the will for discovery and accounting is properly brought in chancery, and is not barred by an accounting by the executors in the orphans court.

2. On balancing the books of a partnership of three members, it appeared that the liabilities of a former firm taken over by the existing firm exceeded the assets so taken over by a certain sum, and that sum was thereafter carried into its suspense account and never paid.—*Held*, that, in ascertaining the interest of a deceased partner, it was proper to charge that interest with one-third of such amount.

3. In ascertaining the interest of a deceased partner in the firm, an amount due one of the surviving partners by the deceased partner should not be deducted from the amount of the latter's interest, as in ascertaining such interest nothing can be deducted except an indebtedness to the firm.

4. Where executors of a deceased partner report to the orphans court a specified amount due from the firm, which is the total aggregate, less items, among which is a charge of a certain amount in favor of decedent's son, who was also a partner, and there was nothing in the account to show that the son, as an individual, claimed to be a creditor of the father's estate, the orphans court in approving the account did not pass upon the question whether the indebtedness to the son was a proper charge against the father's interest.

5. Where a partner by his will appoints his son a trustee of his interest in the partnership, and directs his executors to at once, upon his death, pay to his daughter an amount not exceeding \$1,000, for her immediate support, to be taken out of his interest in the partnership, and the executors' account filed in the orphans court showed that up to a date specified they had paid the daughter \$704.40, and the trustee's account, filed in the chancery court, claims credit as if the daughter had received \$1,000, the trustee is only entitled to a credit for \$704.40.

6. Where the will of a deceased partner directed the trustee of his interest in the partnership to pay quarterly "from and after my death" certain annuities out of the income, the annuities should be paid from the date of his death, although by the terms of the will his interest in the partnership was to be determined as of a date three months subsequent to the date of his death.

7. If a trustee invests money in unauthorized securities, the *cestui que trust* is entitled to the profits; and where a partner leaves his interest in the partnership by will to another partner in trust, and directs that such interest remain in the business for a specified time from a certain date next succeeding his death, on such terms as the trustee may think just, and after that date to be invested according to the trustee's best judgment, and the trustee allows the interest to remain during the five-year period at an agreed rate of ten per cent., if the trustee allows the trust fund to remain in the partnership after the period specified, he should be held to account for it at the same rate.



8. Where a son is executor of the estate of his mother, and receives a certain sum from the sale of property held jointly by the father and mother, which amount is charged to him as executor, and he permits his father to take and keep the money, and he is subsequently appointed executor of his father's estate, it is proper for him to charge such amount against the father's estate.

9. Where a testator leaving real estate dies after May 20th within any given year, his personal estate is chargeable with the payment of taxes assessed as of May 20th of that year.

10. An interest of a deceased partner was continued in the business at an agreed rate as to profits.—*Held*, that no charge should be made against the executors, the surviving partners, or the trustee appointed by the deceased partner's will to hold his interest in the business on account of the good will, as such interest continued to receive the benefit of the good will.

Heard on bill, answer, replication and proofs in open court.

The complainants in this bill are grandchildren of Alexander J. Cameron, who, during his lifetime, was a resident of Ridgewood, in this state. He died on the 30th of September, 1891, leaving him surviving a daughter, Mary Jane Crowley; a son, Alpin J. Cameron, one of the defendants herein; a daughter, Alice E. Cameron; Ida G. Graydon (now Shearman), Carrie L., Alexander J., J. Alpin and Jessie M. Graydon, children of a deceased daughter; Agnes K., Alexander A., Alice A. and Kathleen Maxwell, children of a deceased daughter; Alpin W. Cameron, son of Alpin J. Cameron aforesaid; and Daniel C. and Mary C. Crowley, children of Mary Jane Crowley.

He left a last will and testament, dated the 10th of March, 1891.

The eighth clause of the will is as follows:

"Whereas, I am a partner in the firm of A. J. Cameron & Co., which consists of my son Alpin J. Cameron and William V. Denegre and myself, we being equal partners, now I do hereby give, devise and bequeath all my interest in the said firm and in the assets and business thereof, whether real or personal, unto my son Alpin J. Cameron of the City, County and State of New York, in trust, however, and to, for and upon the following uses, trusts and purposes, that is to say:

"In the first place, I desire that my executors shall take out of the business of the said firm, or out of my share thereof, such moneys as may be necessary to pay my debts, funeral and testamentary expenses, and at once upon my death to pay to my daughter Alice E. Cameron, if she de-

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sires it, an amount not exceeding the sum of one thousand dollars, so that she may have in her hands without delay the pecuniary means necessary for her immediate support.

"I direct my executors to take from my share of the firm the sums necessary to pay the above named three legacies to the hospital and churches within one year after my death.

"In the second place: I wish my said executors with the surviving partners of the said firm to determine and ascertain my interest in the said firm upon the thirty-first day of December next succeeding my death, and I direct that that interest thus determined shall remain in the possession and management of the surviving partners of the said firm for a period of not over five years from and after the thirty-first December next succeeding my death, my said trustee making such equitable terms and arrangements as to the share of my estate in the profits of the said business as he may think just and reasonable. In the third place, I direct that upon the expiration of the said five years my estate shall be severed from the said firm, and shall thereafter when paid (my executors and the said surviving partners having a reasonable time to effect such severance and payment) be and be kept safely and securely invested by my said trustee according to his best judgment together with any accumulations of profits of my share during the said term. or before.

"Out of the income arising from my share of the firm profits or from the said fund my said trustee shall pay quarterly from and after my death to my daughter Mary Jane Crowley during her life. the sum of six hundred dollars per annum. and to my daughter Alice E. Cameron during her life, the sum of three thousand dollars per annum besides said one thousand dollars if she requires it, and at the expiration of the said five years or as soon thereafter as my said executors and the surviving partners can separate the share of my estate from the said firm and pay it to my said trustee, I direct that the whole income shall, subject only to the said annuity to my daughter Mary Jane Crowley, belong absolutely to my daughter Alice E. Cameron for and during the term of her natural life. my trustee collecting and paying to her the whole of the income less the said annuity to my daughter Mary Jane Crowley and the expenses of the said trust, and upon the death of my daughter Alice E. Cameron I direct that my said trustee shall pay to my said daughter Mary Jane Crowley the sum of ten thousand dollars and upon such payment her said annuity shall cease."

The clause then proceeds to vest a power of appointment in Alice E. Cameron, and to make other provisions which, in view of the circumstances, are not material.

Alpin J. Cameron and Alice E. Cameron were nominated as executors of the will.

The executors qualified and filed an account as executors in the office of the surrogate of the county of Bergen, in June, 1899. The bill charges that this is a partial account and is incomplete, and that a certain schedule therein referred to as being at-

tached was not attached; and that in the said account there was a statement that the schedule aforesaid fixed the balance to the credit of Alexander J. Cameron in the firm of A. J. Cameron & Company at \$37,741.63, and that the complainants never saw the schedule aforesaid and never received any notice of the filing or passing of the account in the orphans court.

The bill proceeds to charge that Alexander J. Cameron was, at the time of his death, a member of the firm of A. J. Cameron & Company, and that the other members of the firm were Alpin J. Cameron and William P. Denegre, the three being equal partners; and that after the death of Alexander J. Cameron, the surviving partners continued the business in the old firm name until the present time. And it is charged that the executors and surviving partners did not determine and ascertain the interest of Alexander J. Cameron in the assets and business of the firm upon the 31st day of December next succeeding his death, which was December 31st, 1891, as they should have done in pursuance of the terms of the said will; and that the ten per cent. per annum which, by the account as filed in the orphans court, was allowed upon the balance which that account found to be to the credit of Alexander J. Cameron in the business of A. J. Cameron & Company, was not a just and equitable arrangement as to the profits of the said business which should be attributed to the share of the estate of A. J. Cameron therein, as provided for in the said will.

The bill proceeds to charge that the interest of A. J. Cameron, in the firm of A. J. Cameron & Company, upon the 31st day of December next succeeding his death, was greatly in excess of the amount shown in the account filed in the orphans court by the executors, which, it will be recalled, was \$37,741.63; and that the said interest of Alexander J. Cameron, or his estate, in the said business has remained, from the time of his death to the time of the filing of the bill, in the said firm without any severance and investing, as required by the terms of the will.

The bill further charges that Alice E. Cameron died on the 6th of May, 1905, leaving a last will and testament in which she attempted to exercise the power of appointment vested in her by the will of Alexander J. Cameron as above mentioned.

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The bill further charges that the complainants have not the knowledge concerning the interest of Alexander J. Cameron in the business of A. J. Cameron & Company at the time of his decease, and require discovery.

The bill further charges that Alpin J. Cameron, the executor and trustee, has paid to Mary Jane Crowley and to Alice E. Cameron more money than it was proper for him to pay under the terms of the will and the trust. And it is further charged that Alpin J. Cameron, the trustee as aforesaid, and William P. Denegre, the partner, have refused to disclose to the complainants information concerning the business and the shares and the interests of the estate in the business, and that no proper and legal accounting can be had without the aid of discovery in behalf of the complainants.

It is therefore prayed that discovery be made by Alpin J. Cameron and by William P. Denegre, and that the interest of the estate in the firm of A. J. Cameron & Company be ascertained and determined in accordance with the provisions of the will, and that, when ascertained, it shall be severed from the business of the firm, and that the said interest, and such profits as shall be legally found to be due with respect thereto, shall be accounted for by the said Alpin J. Cameron as trustee, and shall be distributed in accordance with law and the provisions of the will.

The answer of Alpin J. Cameron admits many of the charges in the bill, but maintains that the accounting in the orphans court was final, and states that the actions of the said defendant as executor and trustee were regular and legal, and that the complainants are not entitled to relief in this court, and that the defendants should be dismissed therefrom.

The will of Alice E. Cameron, in which she sought to exercise the power of appointment aforesaid, came before this court and was passed upon in the case of *Cameron v. Crowley* (*Vice-Chancellor Garrison, 1907*), 65 Atl. Rep. 875. Under the decision in that case all of the grandchildren, among whom are the complainants, are *cestuis que trust* in this matter.

Mr. Marshall Van Winkle, for the complainants.

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*Mr. Cornelius Doremus and Mr. Gilbert Collins, for Alpin J. Cameron, trustee.*

*Mr. William Pennington, for Mary J. Crowley, Daniel C. Crowley and Mary C. Crowley.*

GARRISON, V. C.

The first matter that required consideration was whether this was a proper case for this court to exercise its jurisdiction.

It seemed to me that it clearly was.

With respect to the subject-matter involved, the defendant Alpin J. Cameron was by the testator left in such a delicate position that the interposition of the court of chancery, under the circumstances, was practically imperative. Alpin J. Cameron, the son of the testator, was one of the executors of the will. He was one of the partners in the firm in which the testator had a very large investment, and he was also to be trustee of the interest of the testator in the said firm. Under the provisions of the will it became his duty, as one of the executors, to agree with himself, as one of the partners, what the interest of the testator was in the firm, and then, as trustee, to make with himself, as one of the partners, such equitable terms and arrangements as to the profits which should be allowed upon the share of the estate in the said business. His duties and interests as surviving partner, executor and trustee were such that a case was clearly made out for the court of chancery instead of leaving the matter for settlement in the orphans court. The necessity of discovery, the necessity of bringing the surviving partners before the court as parties, the need which the complainants had of the peculiar features of equity jurisdiction which are lacking in the orphans court in such a case, all made for establishing the special reasons which appeal to the jurisdiction of this court and induce it to take over the matter from the orphans court.

In my view the principles are so well settled and this case so clearly comes within them that it is unnecessary to elaborate. The authorities will be found collected in the court of chancery and the court of errors and appeals in the case of *Filley v. Van Dyke* (Vice-Chancellor Garrison, 1908), 74 N. J. Eq. (4 Buch.)

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219; (*Court of Errors and Appeals*, 1909), 75 N. J. Eq. (5 Buch.) 571.

The technical objection interposed by the defendant that the accounting by the executors in the orphans court would bar relief in this court is without merit. Under the will the trustee had cast upon him the duty of securing the interest of the testator in the business of A. J. Cameron & Company, and it is that trustee who is sought here to be brought to account. I do not think it possible that, because as executor he filed an account in the orphans court and stated the amount which he said had been ascertained as the interest of A. J. Cameron in the business aforesaid, this is conclusive upon the parties. In my view it is perfectly clear, under the circumstances of this case, that what that interest was must be ascertained and settled in this court upon equitable principles.

Upon determining that this court would assert its jurisdiction an interlocutory decree was then entered by which it was ordered that the defendant Alpin J. Cameron, as trustee, should make and render an account in this court of the estate bequeathed to him in trust, less the debts, legacies and testamentary expenses directed by the testator to be paid thereout, as such debts, legacies and testamentary expenses have been established by the accounting of the executors in the orphans court of Bergen county and the decree of the said court on the said accounting, and should further account for such income on the balance as said trustee may be lawfully chargeable with from and after the death of Alice E. Cameron. The matter was referred to a master, and the trustee was directed, within a given number of days, to present to the master his account, to which any party might present written exceptions to the master, and thereafter either party might apply to the court for directions as to the scope of the testimony that should be required or permitted under the exceptions. Various such applications were made to the court, and directions and instructions issued in pursuance thereof. By an agreement between the parties expert accountants were employed to investigate the books of A. J. Cameron & Company, and they made an extensive report which accompanies the master's report.

The master's report and the exhibits, including the report of the expert accountants aforesaid, cover many hundreds of pages. Upon the coming in of the master's report exceptions were filed by each of the parties thereto, and since, with respect to some of them, the court desired to send the matter back to the master, all questions were reserved until the coming in of the supplemental report of the master. When that supplemental report came in all of the exceptions of the parties were considered and are now to be disposed of.

The accounts and report are so voluminous, and the questions raised are of such a character that, I think, in the interest of clearness, I should state the issues and findings and my determination thereon in narrative form, rather than attempt to take them up piecemeal under specific exceptions.

Prior to 1880, Alexander J. Cameron and Alpin J. Cameron were partners in a firm called A. J. Cameron & Company. W. P. Denegre was an employe of that firm. On the 1st day of January, 1880, a new firm was formed composed of Alexander J. Cameron, Alpin J. Cameron and W. P. Denegre, using the same firm name.

We have no books of the old firm. The books of the new firm, under an account headed "Old Books," began with two items. They charge themselves with liabilities, under date of January 1st, 1880, "to sundries, \$68,563.08." They credit themselves as with assets, under the same date, "by sundries, \$58,499.48."

There is no item showing anything to the credit or debit from the old books in the individual accounts opened with Alexander J. Cameron or with Alpin J. Cameron, but under date of January 1st, 1880, Denegre's account opens with a credit "by old ledger, 249, p. 3. \$11,063.49."

The details of the items of the "old book" account set forth above appear in a journal then opened, and that journal account does not contain any items concerning the individual accounts of the partners, excepting the \$11,000 item above alluded to, credited to William P. Denegre.

With respect to the matter of determining and ascertaining the interest of Alexander J. Cameron, the testator, in the firm of A. J. Cameron & Company, which, under the eighth clause of

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the will, the executors with the surviving partners were to do, the facts proven are as follows:

Some time in the year 1892, and after the books had been made up as of December 31st, 1891, a brother of Alexander J. Cameron, named Allan Cameron, was requested to come to the office of the firm and go over the books, and he did so, and ascertained, in conjunction with the surviving partners, that the interest of Alexander J. Cameron in the firm of A. J. Cameron & Company, as shown by those books, was \$48,306.56, and that certain deductions should, in his judgment, be made therefrom.

Subsequently, and on the 8th day of November, 1893, Alpin J. Cameron desiring to have this in writing, requested that Allan Cameron reduce it to writing, and he did so, the writing being as follows:

"NEW YORK, November 8th, 1893.

"Mr. Alpin J. Cameron, in account with the Estate of Alexander J. Cameron.

Dec. 31st. Bal'ce to credit of Alexr J. Cameron on books of	
A. J. Cameron & Co. this date.....	\$48,306.56
Less his 1-3 deficiency of \$6,887.87.....	\$2,295.95
Due Alpin J. Cameron as per old books	
Dec. 31. 1881.....	8,268.98
	10,564.93

Actual balance due Estate of Alex J.

Cameron ..... \$37,741.63

"The above account is taken by me from the books of A. J. Cameron & Co. and submitted to Alice E. Cameron for approval and which accts and Bal'ce of \$37,741.63 I find to be correct.

"ALLAN CAMERON.

"New York, Nov'r. 8th, 1893."

Shortly after the death of Alexander J. Cameron (which occurred on the 30th of September, 1891), a new book was opened termed "Private Ledger," and this book starts with the credit to Alexander J. Cameron (or his estate) of \$48,306.56. The first item against this sum is \$2,295.95. This item is the one mentioned in the memorandum of Allan Cameron as "less his 1-3 deficiency of \$6,887.87 = \$2,295.95."

The first ledger opened by the new firm, in the account headed "Old Books," as aforesaid, started, as has been stated, with sums of debit and credit. From an inspection it will appear that the



debts exceeded the credits by something over ten thousand dollars. Sundry additions are made to each side of the account, and on the 31st of December, 1882, the account is balanced. At that time, as appears from the account, there was an excess of liabilities over assets of \$6,887.87—in other words, the firm was \$6,687.87 short of making these two accounts balance, and this was distributed among the partners as a loss, upon the basis of one-third each.

In the private ledger the one-third above mentioned is charged against the account of A. J. Cameron, or the estate of Alexander J. Cameron, deceased, and thereafter the income on the amount of the interest of Alexander J. Cameron in the firm was calculated upon a total reduced by this sum.

In 1899, on the 1st of June, the executors of Alexander J. Cameron, deceased, filed in the orphans court of Bergen county an account. After stating that no inventory was taken, having been waived by the heirs, they charge themselves with some small amounts of cash, and then with the following item:

"1892. Jan. 1. To balance to credit of Alexander J. Cameron in the firm of A. J. Cameron & Co. Yarn Merchants of New York and Philadelphia, of which firm Alexander J. Cameron was a member. This balance was determined at the request of the Executors, by Allan Cameron of Westford, Mass., brother of Alexander J. Cameron. See Allan Cameron's statement accompanying this account..... \$37,741.63"

The next item under it is as follows:

"The above interest of Alexander J. Cameron was invested with A. J. Cameron & Co. with the understanding that A. J. Cameron & Co. would pay for five years or longer at rate of 10% per annum on balance of the account."

Items then appear calculating ten per cent. on \$37,741.63 or less (the lesser sum or principal being arrived at by deductions therefrom with which we are not now concerned).

On the private ledger aforesaid there was no deduction of any other sum, initially, than the \$2,295.95 above referred to. The \$8,268.98 above referred to is not found in the private ledger,

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and, in fact, is not found in any of the books of account produced.

The careful examination made by the experts agrees so substantially, as to the interest of Alexander J. Cameron in the business as of December 31st, 1891, with the result reached by Allan Cameron, that I shall adopt the result reached by the latter, and fix the initial figure of such interest at \$48,306.56, as he did.

I do not think there can be any substantial dispute about the propriety of deducting from this sum the item of \$2,295.95 above referred to. That sum is the one-third of the sum of \$6,887.87, and this last sum is the difference between the credit and debit sides of the "old books" account above referred to. When the new firm started in 1880, the first thing that appears in their books was this account. It was taken over, evidently, from the old firm, and contained amounts to be paid and amounts to be received, which were placed under their appropriate columns in the account. Subsequently, this account was balanced, and it was shown that the liabilities thereunder exceeded the amount received by \$6,887.87; and as the partners shared profits and losses equally, each partner was liable for his one-third of this sum. After the time of balancing, as aforesaid, this item of liability was carried into suspense account, and was never paid. Under these circumstances, it seems perfectly clear to me that it was proper, in ascertaining the interest in the firm of this partner, to charge him with his one-third of this liability.

The next item which it is necessary to consider at length is that of \$8,268.98.

The theories of the respective parties concerning this are as follows: The complainants contend that, since the ascertainment and determination by Allan Cameron, as now confirmed by the investigation of the experts, show that the interest of Alexander J. Cameron in the firm at the time in question was \$48,306.56, the matter is practically settled, and there is no ground upon which the defendant may properly claim the right to deduct this sum from that initial ascertainment and determination of the amount of the *corpus*.

By referring back to the memorandum made by Allan Cam-

eron at the time of the ascertainment by him, it will be found that he states the matter as follows: "Due Alpin J. Cameron as per Old Books, Dec. 31, 1881, \$8,268.98," and it will be seen that he includes this sum as among those to be deducted from the aggregate sum which he finds to be the interest of Alexander J. Cameron in the business as of December 31st, 1891.

The complainants contend that if this was a debt due from Alexander J. Cameron to Alpin J. Cameron, it should have been treated as such, and should have been proven, and that the whole subject-matter being open to inquiry, and no proofs being adduced by Alpin J. Cameron to sustain the same, there is no basis for allowing it.

On behalf of the defendant Alpin J. Cameron it was urged that since this item was deducted by Allan Cameron that fact is determinative; and further, that since the amount reported by the executors in their account to the orphans court was the total as found by Allan Cameron, less this deduction, the reduced amount thereby becomes the initial charge against the trustee, and this item of \$8,268.98 must be held to have been passed upon and allowed at that time.

I do not see how it can be seriously contended that in any ascertainment of the interest of Alexander J. Cameron in the firm there could be any propriety in diminishing what the books showed was his interest by this sum of \$8,268.98. It cannot possibly be correct to say that a partner's interest in a firm is affected favorably or unfavorably by sums which he owes, outside of the firm's business, to his partners, or by sums which, outside of the firm's business, are owed to him by his partners. His interest in the firm's assets, as shown upon an accounting, is utterly irrespective of what is owed to him by anyone excepting the firm, or by what he owes to anyone excepting the firm, and in this respect it makes no difference whether the amounts that he owes outside of the firm are to his partners or to strangers, or whether the amounts due to him outside of the firm are due from partners or strangers. The amount in question was certainly nothing that was owed by him by reason of the partnership relation. There is not the slightest suggestion in the testimony, or in any of the books, that this \$8,268.98 had any

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connection whatever with the business of the firm with which we are concerned—that is, the firm composed of the two Camerons and Denegre, which was formed January 1st, 1880.

The only serious argument of the defendants upon this point was based upon this reasoning: That apparently there were some transactions between Alexander J. Cameron and his son Alpin, probably in connection with the old firm (the suggestion arising, undoubtedly, out of the fact that there is mention made of the “old books”), and that, as a result of these transactions, there was a credit in favor of the son against the father of this item of \$8,268.98, and that when Allan Cameron came to make his determination and ascertainment of the interest of Alexander J. Cameron in the business, he considered that this debt, which he believed to be due and from the father to the son, should be deducted before the son, as executor or trustee, should be charged with the *corpus* of the estate to be so held by him. And, therefore, they say, when the total amount of the interest was arrived at, Allan Cameron, in his statement, deducted from such total items, among them this one, which, as therein set forth, was for a debt due by the father, the testator, to the son, the executor and trustee.

By referring back to the item reported in the account of the executors to the orphans court, it will be found that the amount there stated to be due from the firm to the estate is \$37,741.63 (which is the total aggregate, less items including the item of \$8,268.98 that we are inquiring about), and that there is memorandum, “see Allan Cameron’s statement accompanying this account.” The complainants allege, and, I think, prove, that this statement did not accompany the account, and could not be found in the surrogate’s office. However this may be, there was nothing in this account to show that Alpin J. Cameron, as an individual, claimed to be a creditor of the estate of Alexander J. Cameron, of which he was one of the executors, to the amount of \$8,268.98. And under these circumstances I do not think that it can be properly held that the orphans court passed upon this question at all, even technically. There is no pretence that it actually passed upon it—that is, that the matter was in any such way exhibited before the orphans court that it can

honestly be said by anyone to have considered and passed upon the propriety of allowing this debt claimed to be due by the executor out of the estate of the decedent.

In my view of this case, as before expressed, it is undoubtedly the right of this court, under all the circumstances, to now ascertain and determine what amount the trustee shall be charged with as the *corpus* of the estate for which he is responsible, said *corpus* to consist of the interest of Alexander J. Cameron, his decedent, in the business of A. J. Cameron & Company as of December 31st, 1891.

In this view of the matter this item cannot be allowed as a deduction.

Excepting the reference to it contained in the memorandum of Allan Cameron, which the defendant Alpin J. Cameron produces at the trial, there is no other proof or suggestion of proof concerning it. No old books are produced in which any such item appears, and no oral testimony is produced to prove any such item. Alpin J. Cameron himself was utterly unable in any way to prove anything upon which any proper finding in his favor with respect to this item could rest.

Since I do not find that it was proper at all to consider this item in connection with the interest of Alexander J. Cameron in the firm of A. J. Cameron & Company, since it had no connection with his partnership account at all, I find that Allan Cameron's including it in his statement is immaterial; that he should not have included it, and that no one is bound by the fact that he did include it.

Finding, as I do, that the real question is whether this item is one that Alpin J. Cameron has the right, as against the estate of his father, to charge against the latter, and that he has not produced any proof whatever to justify crediting him with the same, it would not be proper to do so, and, therefore, I find that the initial credit of \$48,306.56 should be reduced by the \$2,295.95 before dealt with, but not by the \$8,268.98 just dealt with.

The result, therefore, is that we have ascertained and charged the trustee with the proper *corpus* of the estate, subject, however, to certain other deductions, the propriety of some of which is not

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questioned by anyone, and the propriety of others being the subject of attack concerning which this opinion will be found to deal.

It will be recalled that, after the ascertainment provided for in the will was made, the will directs that the trustee shall arrange for an equitable and just return upon this interest, which is to remain in the business for a period not exceeding five years. The arrangement made was that ten per cent. interest should be allowed upon the ascertained interest of A. J. Cameron's estate remaining in the firm. At first the complainants contended that this was not a just and reasonable amount to allow out of the profits. Subsequently, they conceded that it was, and all contest over this matter was abandoned before the master and before me. Therefore, it is settled in this case that ten per cent. upon the ascertained interest of the decedent in the business was proper, and all calculations are made upon that basis.

With respect to the question of payments out of income to Alice E. Cameron, a question arose by reason of the language of the will, but it seems to me that the matter is perfectly plain when carefully considered. It will be found, by referring to the clause of the will quoted in the beginning of this opinion, that the testator provides, among other things, that the executor shall take out of the business of the firm, or out of his share thereof, such moneys as may be necessary to pay debts, funeral and testamentary expenses, and at once, upon his death, to pay to his daughter Alice, if she desires it, an amount not exceeding the sum of \$1,000, which, as he sets forth, was for the purpose of putting into her hands without delay the pecuniary means necessary for her immediate support. It appears from the proofs and from the accounting of the executors filed in the orphans court that up to December 31st, 1891, the executors had paid to Alice E. Cameron \$704.40. In the account filed in this court by the trustee, the latter, under date of December 17th, 1891, has two items as follows:

"Alice E. Cameron, Account of annuity 3 months at \$3,000 per year.....	\$750.00
"Alice E. Cameron. Legacy.....	1,000.00"

I am clearly of opinion that, in the light of the portion of the will just above referred to, the trustee is only entitled to credit for the \$704.40 on account of the \$1,000 legacy, and that such \$704.40 should come out of the *corpus* of the estate, as that was clearly the intention of the testator as above stated.

It will be found that he provides that out of the *corpus* she is to have an amount "not exceeding \$1,000, if she desires it." All that she desired—or, at least, all of such desire that they responded to—was to the extent of \$704.40; and that is the only sum that the accountant is entitled to allowance for with respect to this \$1,000 legacy.

With respect to the time when the income is to be paid, I find as follows: While the will provides that the ascertainment of the amount of interest that the testator had in the business shall be determined as of December 31st succeeding his death, and that then the allowance of profits thereon shall be made, it is proper, under the law applicable here, to commence the income to the annuitants from the date of the death, namely, September 30th, 1891. The will itself provides upon this subject as follows: "Out of the income \* \* \* my said trustee shall pay quarterly from and after my death," &c.

It will be recalled that, under the will, \$600 of income each year was to be paid to one daughter, Mrs. Crowley, and \$3,000 to the other daughter, Alice E. Cameron, and that this was to continue for five years from the 31st of December, succeeding his death, which was 1891.

The trustee's account showed that during these five years much more than these sums of money were paid out to Mrs. Crowley and to Miss Cameron by the trustee. This he had no right to do, and the accounts must be so adjusted as to comply with the requirements of the law in this respect.

Under the directions of the court the master has stated the accounts as the court finds that he should in these particulars. He has first ascertained the interest of Alexander J. Cameron in the firm of A. J. Cameron & Company, as of December 31st, 1891. He has then deducted the one-third of the liability which, as I have before stated, I find proper to be deducted, and the debts, funeral and testamentary expenses as provided by the will,

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and certain other items which need not be specifically referred to; and has thus reached what I should refer to as the "primary *corpus*"—that is, the sum upon which the allowance of profit or income is to be calculated, such profit or income, as before stated, being properly fixed at ten per cent. From the date of the death, and for the five-year period, the accountant is credited with \$3,600 a year, being the \$600 of annuity to Mrs. Crowley and the \$3,000 of annuity to Miss Cameron. After the five-year period, he is credited with the total income on the *corpus*, because after that period the entire income was payable to Miss Cameron. After Miss Cameron's death he is to be credited with \$10,000 out of the *corpus*, which was payable to Mrs. Crowley. After that sum is deducted a new sum is reached as the *corpus*, and during the time that that continued in the business, unsevered, he is chargeable with the ten per cent. as agreed upon.

With regard to the matter of the allowance of interest as against the trustee, and when the ten per cent. as the fixed amount of profits allowed on the *corpus* shall cease, my findings are as follows: All the books that were furnished by the trustee to the court bring the account no further down than December 31st, 1906, and, consequently, all calculations cease there. On November 13th, 1906, an order was made in this cause under which the trustee brought into this state and deposited \$20,500 at three and one-half per cent. interest, and it was stipulated between the counsel for the respective parties that, as to so much of the estate chargeable against the trustee, the proper allowance of interest against the trustee is the sum of three and one-half per cent., which, as above stated, was the amount received by him on that sum.

With respect to the amount of *corpus* with which the trustee is found to be chargeable, over the sum of \$20,500, I find that he should be charged with ten per cent. interest thereon.

So far as appears from the proofs, he has retained this sum (in excess of \$20,500) in his business, and I see no reason why, while it is there, it should not receive the same allowance for profit as it always did receive from the time that it was first left in the business under such an arrangement as to profits.



It is not necessary to cite authorities to establish the proposition that if a trustee invests money in an unauthorized security and makes profits, the *cestui que trust* are entitled to the profits thus made on their *corpus*.

Since it does not appear that there was any severance as provided for by the will, this rule applies to the trustee, and the ten per cent. on such excess of the *corpus* over \$20,500 should have charged upon it, as against the trustee, ten per cent. interest.

Among the items passed upon by the orphans court and allowed in favor of the executors of Alexander J. Cameron was one of \$1,500. Since, under my instructions, the master was to allow all of the debts, funeral and testamentary expenses, and take them out of the *corpus*, this item was, among others, deducted in the ascertainment of the primary *corpus*. The propriety of this allowance in favor of the trustee is challenged by the complainants, and the facts and my findings with respect thereto are as follows:

In the account filed by the executors of Alexander J. Cameron's estate in the orphans court on the 1st of June, 1899, and duly passed by the decree of that court, they claim credit, among other things, for an item as follows:

"Cash. Estate of C. C. Cameron, being amount  
collected by Alexander J. Cameron from sale  
of real estate in Boston, Mass. Voucher 7. . . . \$1,500.00"

This, together with all the other items for which the executors claim credit, were passed upon and allowed by the orphans court. The complainants now produce an account from the orphans court of Bergen county in the matter of the estate of Catherine C. Cameron, of which estate Alpin J. Cameron was the sole surviving executor. And in that account, under date of June 3d, 1899, there is, among the items with which the executor charges himself, the following:

"Proceeds of sale of property in Boston, Mass.,  
held jointly by A. J. and Catharine C. Cam-  
eron . . . . . \$1,500.00"

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The argument of the complainants upon this point was that by this last-mentioned account Alpin J. Cameron showed that he had received this \$1,500 as executor of his mother's estate, and therefore, of course, had no right to charge the same \$1,500 against his father's estate. There could be no doubt about this if these were the facts. But I do not find that the proofs produced before me show that these were the facts. It is true that they show that when he was accounting as executor of his mother's estate he charged himself (as, of course, he should do) with whatever, as executor, came to his hands, or that for which he was responsible. Since, under the proofs, it is shown that he was responsible for the proceeds of the sale of his mother's property, and had permitted his father to take and keep the money, it was, of course, proper for him to charge himself with this \$1,500 for which he was thus responsible. But the proofs do not show that he ever actually received the money from his father—in fact, they prove that he did not. Therefore it was entirely proper for him, as against his father's estate, to claim the \$1,500 which his father owed to him as executor of his mother's estate.

Since this matter was included in the items of charge and discharge before the orphans court in the settlement of the estate of the father, Alexander J. Cameron, and was passed upon there in favor of the executors, and since I find that it was properly allowed, I have instructed in this suit that it be included among the items to be deducted from the amount ascertained to be the interest of A. J. Cameron in the business of A. J. Cameron & Company in accordance with the provisions of the will.

The complainants object to the allowance out of principal of taxes for the year 1891, claiming that the same was a lien upon the real estate, and should not be charged against the personal property account of the estate. I find that, under the law, where a testator leaving real estate dies after the 20th of May of any given year his personal estate is chargeable with the payment of the taxes which are assessed as of the 20th of May of that year. *Brown v. Brown* (Vice-Chancellor Garrison, 1907), 72 N. J. Eq. (2 Buch.) 667. The item or items in question, therefore, are properly deducted from the principal or *corpus*.

Neither the master nor this court have allowed anything as

against the trustee, the executors or the surviving partners on account of the good will of the business of A. J. Cameron & Company. This is in accordance with the view which I take of this case, and because I do not find it proper in this case to make any such allowance. I shall not stop to burden this already long opinion with any reference to the authorities concerning the good will of the business in which a decedent was interested at the time of his death, because I think such law inapplicable to the case in hand. All of the interest of Alexander J. Cameron in the business of A. J. Cameron & Company has been, down to the filing of the bill in this suit, continued in the business, and an account which it has been agreed is a fair amount as that interest's share of the profits of the said business has been allowed on it, and such allowance (excepting with respect to an amount which the complainants themselves required to be taken out) has continued down to the time of decree.

Of course, since the death of Alexander J. Cameron the firm has lacked his personal efforts, and has made what has been agreed upon all hands to be a fair allowance of profit for the amount which his estate had invested in the business. Under these circumstances, I do not think that it would be proper to hold that, in addition thereto, an allowance in favor of the estate should also be made for good will. Since I find that, under the circumstances of this case, the decedent's interest in the firm has received the benefit of the good will, which would otherwise be attributable to his share, I conclude that no further or other allowance should be made specifically therefor.

With respect to the complainants' objection to the allowance of commissions to the executors of Alexander J. Cameron's estate, and to the payments of certain other items by said executors as part of the testamentary expenses, I find in favor of the executor-trustee. It is clearly provided in the will that out of the *corpus* of the estate, namely, out of his interest in the business of A. J. Cameron & Company, as ascertained, there shall come, among other things, his debts, funeral and testamentary expenses, and I therefore find that it is entirely proper, when these have been ascertained, to deduct them; and, with respect to all of such as were ascertained by the orphans court as afore-

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said, I instructed the master, and do now find that it was proper to deduct them.

Since the master's report as finally made embodies the various instructions given him by the court from time to time, and I have, in the preceding part of this opinion stated my views with respect to all of the disputed matters, the result is that I dismiss all such exceptions as applied to the final report, by whichever side taken, and confirm the report as made, and will decree accordingly.

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THOMAS G. HILLIARD, substituted administrator, &c.,

v.

ALLEN PARKER et al.

[Submitted October 20th, 1909. Decided October 20th, 1909.]

1. A gift of property to a personal trustee to use the income to keep certain graves in good condition forever was not a charity, but a purely private trust and void as a perpetuity, notwithstanding 1 Gen. Stat. 1895 pp. 350, 351 §§ 7, 14, providing for the incorporation and regulation of cemetery associations.

2. A gift of a fund, the income of which was to be expended by the executor to purchase fuel for the most needy women in the borough of W., to be selected by the executor, excluding women living with their husbands, was a charitable trust, and therefore not objectionable as offending the rule against perpetuities.

3. A trust to use the income of a fund to purchase fuel for the most needy women in W., to be selected by testator's executor, excluding women living with their husbands, was not void for uncertainty.

4. A gift of the income of a fund to be paid annually to the treasurer of a library to be expended in the purchase of books, and to be and remain always a fund for that purpose, was a valid charity; and a library association which issued stock to members, entitling each to borrow books from the library, subject to payment of fines for delay, and which also issued permits to others, not stockholders, to borrow books on payment of five cents per week for each volume, no dividends being paid to stockholders, the object of the association being to disseminate knowledge by means of books, periodicals, reviews, and other literature,

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was a charitable corporation, and therefore authorized to take and use the income of the trust for the purchase of books to be used in connection with the library, and hence the gift was not violative of the rule against perpetuities; the *corpus* of the bequest forming no part of the assets of the association.

On bill for construction of will.

*Mr. Enoch S. Fogg*, for the complainant.

*Mr. Howard B. Keasbey*, for Allen Parker and others.

*Mr. Morris H. Stratton*, for the Baptist Society at Woodstown, in the county of Salem.

*Messrs. French & Richards*, for the trustees of the Pilesgrove Library Association.

LEAMING, V. C.

The bill is filed for the purpose of obtaining a judicial construction of certain clauses in the will of Thomas Enoch, deceased.

The first clause in question is as follows:

*"Fourth.* I do order that my one remaining share of Bank Stock shall be and remain as a fund and the dividends arising therefrom shall be expended as may be necessary and shall be used in keeping my grave-yard lot in good condition, and if the said dividends shall not all be required to keep my own lot in condition the residue annually shall be used first in keeping the graves of Naomi Jess and Samuel Ernst in condition then for the balance of the grave-yard where I may be buried forever." \* \* \*

It is to be regretted that this provision of the will cannot be sustained. Our law does not permit the creation of trusts in perpetuity except for charitable or public purposes. It has been repeatedly determined in this court that a trust for the purpose of keeping in repair the burial place of testator is a purely private trust and is not a trust the object of which is a charity. *Detwiller v. Hartman*, 37 N. J. Eq. (10 Stew.) 347, 353; *Hartson v. Elden*, 50 N. J. Eq. (5 Dick.) 522, 525; *Corle's Case*, 61 N. J. Eq. (16 Dick.) 409, 410. In *Corle's Case* it is pointed

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out that the provision for the general improvement of the cemetery will not remove the trust from the operation of the defined rule. Our statute touching incorporated cemetery associations can in no way aid the infirmity of this bequest. 1 *Gen. Stat.* pp. 350, 351 §§ 7, 14; *Moore's Executor v. Moore*, 50 *N. J. Eq.* (5 *Dick.*) 554; *Corle's Case*, *supra*. The cemetery here in question is not owned by an incorporated cemetery association, and the bequest is not to a cemetery association directing it to take and hold the property bequeathed in trust to apply its income in a manner directed. I am obliged to treat the bequest above quoted as void because in conflict with the law against perpetuities.

The second provision of the will which is now brought in question is as follows:

"I do order that the sum of two thousand dollars now in the hands of and owed to me by Reuben Woolman shall remain in his hands as long as he will keep it and the net interest arising therefrom shall be annually expended by my executor in the purchase of fuel for the most needy women of the Borough of Woodstown, to be selected by my surviving executor as he shall judge of their needs; provided the same shall not extend to women living with their husbands, and shall be a perpetual fund forever."

The \$2,000 here referred to has since been paid by Reuben Woolman to the executor and the bequest is now challenged as void for indefiniteness.

I am convinced that the trust created by this bequest is a valid one. The trust is clearly a charitable trust, and as such there can be no objection to its creation in perpetuity. *Goodell v. Union Association*, 29 *N. J. Eq.* (2 *Stew.*) 32, 34; *Trustees v. Wilkinson*, 36 *N. J. Eq.* (9 *Stew.*) 141; *S. C.*, 38 *N. J. Eq.* (11 *Stew.*) 514; *Green v. Blackwell*, 35 *Atl. Rep.* 375. I think it must also be said to be settled in this state that a trust of this nature is not void for uncertainty. In *Goodell v. Union Association*, *supra*, the trust was that the income "be applied to alleviating the wants and sufferings of the deserving poor of the town of Mount Holly," and the trust was sustained. In *Hesketh v. Murphy*, 35 *N. J. Eq.* (8 *Stew.*) 23, the trust was to employ certain income "for the relief of the most deserving poor of the

city of Paterson aforesaid forever, without regard to color or sex ; but no person who is known to be intemperate, lazy, immoral or undeserving, to receive any benefit from said fund." This gift was held to be a valid charity as against the objections that it was too indefinite, and that it failed to provide a power of selection of its objects. This decision was affirmed in *36 N. J. Eq. (9 Stew.) 304*. The principles defined by the cases already cited fully support the gift now in question.

The third provision of the will which is now brought in question is as follows :

"I do order that the sum of five hundred dollars be placed at interest on good freehold security and that the net interest thereof be annually paid to the Treasurer of the Woodstown Library to be expended in the purchase of books, and to be and remain always a fund for that purpose."

It is conceded that a bequest for the promotion of learning is a gift for charitable uses within the exception to the rule against perpetuities. See *Stevens v. Shippen, 28 N. J. Eq. (1 Stew.) 487, 532*; *Taylor v. Trustees of Bryn Mawr College, 34 N. J. Eq. (7 Stew.) 101*. It is also admitted that by the Woodstown library, as referred to in the will, testator referred to a certain library association at Woodstown, the exact name of which is "The Trustees of the Pilesgrove Library Association." It is also admitted that this library association is incorporated under the act "to promote societies for the promotion of learning" (*2 Gen. Stat. p. 1925*) ; that the association has a collection of books of a general character for loan to citizens of Woodstown and others, and that the association has certificates of corporate stock which it issues to its members at a nominal payment of one dollar per share, each member being entitled to hold as many shares as he may care to take, but each holder of stock being entitled to but one vote in the management of the affairs of the association, and each member is required to pay into the treasury of the association each year dues equal to one dollar for each share of stock held, and is entitled to borrow from the library of the association one book on each share of stock so held, but subject to the payment of fines for detention of books longer than the time authorized by the general rules of the association, and members,

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and others not members, are privileged to borrow from the library of the association on permits issued for that purpose such other books as they may desire on payment of five cents per week for each volume so borrowed. It is also admitted that no dividends or profits are paid or contemplated by the association to its stockholders, and that all receipts for stock, annual dues, permits and fines are turned into the treasury for the purpose of purchasing books and the payment of the current expenses of the association. It is also admitted that the constitution of the library association defines its object to be "the dissemination of knowledge by means of books, periodicals, reviews and other literature," and that the association in its work has been giving a course of free lectures, and that its library for years has been the meeting place of the Naturalist Field Club, and also the meeting place of the University Extension Centre, which societies have free access to such books as are needed in their work; that free use of the library has been given to the professor and teachers of the public schools, and awards of merit have been at times given by the library association to children of the public schools.

I think it manifest that the donee in this bequest referred to must be regarded as an association charitable in a legal sense so far as the rule against trusts in perpetuity is concerned. It is manifestly an association formed and conducted for the public good in the dissemination of learning and in no sense for private gain or profit. The bequest directs that the income be expended for the purchase of books and the admitted facts touching the work and objects of the library association render it apparent that testator's intention was the creation of a trust for the benefit of the public in its use of the books so purchased. In *Alfred University v. Hancock*, 69 N. J. Eq. (3 Robb.) 470, it is said: "All gifts for the promotion of education are charitable in a legal sense, where the elements of private gain are wanting, and where the scheme is, in part, supported by public or private contributions." I do not think the fact that stock is held in the library association by its members in the manner already stated, and that at dissolution the surplus assets of the association may be lawfully distributable among its stockholders, will operate to defeat the bequest now under consideration. The *corpus* of the



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bequest forms no part of the assets of the association, and the income from the bequest will, so long as used as directed by the testator, serve its manifest purpose.

I will advise a decree in accordance with the views herein expressed.

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EMMA BURKE ELMER

v.

TRENTON TRUST AND SAFE DEPOSIT COMPANY, administrator, &amp;c.

[Submitted November 1st, 1909. Decided November 3d. 1909.]

1. Where the principal of a wife's separate estate comes to the possession of her husband, and is used by him, the presumption of law is against a gift.

2. Evidence held to show that money coming to the possession of a husband from his wife's separate estate was not a gift.

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On bill, answer, replication and proofs.

*Messrs. Thompson & Cole*, for the complainant.

*Messrs. Vroom, Dickinson & Scammell*, for the defendant.

LEAMING, V. C.

The evidence establishes the fact that Dr. Elmer received from his wife and deposited in his own bank account money to the amount of \$8,862.21. His wife also paid for him to Collins \$1,198.41, and to Katzenbach & Company, \$549.30. All of the money referred to was the separate estate of Mrs. Elmer. Most of the money so paid was from the principal of Mrs. Elmer's estate; a smaller portion was from its income. A considerable

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portion of the money referred to was undoubtedly expended in improving the residence property of Dr. Elmer which was at the time occupied by him and his wife.

Since *Adoue v. Spencer*, 62 N. J. Eq. (17 Dick.) 782, the law must be regarded as settled in this state to the effect that where the principal of a wife's separate estates comes to the possession of the husband and is used by him the presumption of law is against a gift, although the opposite presumption may exist as to income from the wife's separate estate. See, also, *Brady v. Brady*, 58 Atl. Rep. 931; *Small v. Pryor*, 69 N. J. Eq. (3 Robb.) 606; *Mayer v. Kane*, 69 N. J. Eq. (3 Robb.) 733, 738. These presumptions, however, can only be controlling in the absence of satisfactory evidence of a contrary purpose. Evidence inconsistent with the idea of a loan existed in *Black v. Black*, 30 N. J. Eq. (3 Stew.) 215. In the present case the evidence is wholly inconsistent with the idea of a gift of either the principal or income. During the period of the advances in question the husband repeatedly signed statements showing the amount of money he was receiving from his wife, and in his bank book most of the deposits made by him of money received from his wife were marked by him in pencil with his initials. These acts on his part cannot be reconciled with the idea that any of the money so received by him were gifts to him.

I will advise a decree for complainant for the aggregate of the amounts above stated.

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KATHERINE McCULLOUGH

v.

ROSE WARD et al.

[Submitted October 19th, 1909. Decided November 11th, 1909.]

1. For misjoinder of parties defendant those only can demur who are improperly joined.

2. Where the demurrer raises the objection that the bill discloses that the real estate sought to be partitioned is in the possession of the demurrant under a claim of title adverse to the title asserted by the complainant, the demurrer will be allowed.

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On several demurrers of Lauretta Plunkett and Michael Reilly to bill for partition.

*Mr. Winfield S. Angleman*, for the demurrants.

*Mr. Arthur H. Bissell*, for the complainant.

LEAMING, V. C.

1. The bill having been amended by the elimination of the clause relating to unknown descendants of deceased brothers and sisters of Jane Reilly, the demurrer of Lauretta Plunkett presents the single objection that tenants by the curtesy initiate are not proper parties defendant to a bill for partition of real estate.

It is unnecessary to give consideration to the merits of the objection here urged. For a misjoinder of parties as defendants, those can only demur who are improperly joined. *Story Eq. Pl.* § 544; *Miller v. Jamison*, 24 N. J. Eq. (9 C. E. Gr.) 41, 44; *Herman & Grace v. Freeholders*, 64 Atl. Rep. 742, 746. I am not able to reach the conclusion that a different rule should obtain in a suit for partition of real estate. It is of interest to a co-tenant that no unnecessary cost be made a charge against the

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land sought to be partitioned, but that interest can be appropriately protected at such time as complainant may seek to make the costs a charge. The demurrer of Lauretta Plunkett must be overruled.

2. The demurrer of Michael Reilly raises the additional objection that the bill discloses that the real estate sought to be partitioned is in the possession of demurrant under a claim of title adverse to the title asserted by complainant.

The title which complainant asserts in behalf of herself and her co-tenants is a title by descent from Jane Reilly, deceased. The averments of the bill touching demurrant Michael Reilly are as follows:

"And your oratrix further shows that Michael Reilly, who was the husband of the said Jane Reilly, deceased, is now living; that he was appointed administrator of the estate of said Jane Reilly, deceased, and is in possession of the said premises, and has let a part thereof to one Mr. Rees, and another part thereof to one A. Werner, and another part thereof to a Mrs. Lewby, and another part thereof to a Mrs. Fisher, as your orator is informed and believes, and collects and retains from said Mr. Rees, A. Werner. Mrs. Lewby and Mrs. Fisher, the rents thereof, notwithstanding the fact that as there were no issue of the marriage of the said Jane Reilly and Michael Reilly, the said Michael Reilly is not entitled to any right of curtesy in the said premises, and that his possession thereof and his appropriation of the rents, issues and profits arising therefrom, whether as administrator as aforesaid, or individually, are without right and contrary to the rights and interest of your oratrix and the other heirs of the said Jane Reilly, deceased."

These averments of the bill disclose the fact that the premises sought to be partitioned are in the possession of demurrant as a stranger to the title under which complainant and her co-tenants claim, and that demurrant is exercising the right to execute leases of parts of the premises and is appropriating the rents, issues and profits of the land. From these averments, taken in connection with other averments of the bill which specify the several co-tenants and their respective shares, it must be here assumed as a fact that demurrant Reilly is not an owner of any interest in the land in question which is derivative of the common source of title under which complainant and her co-tenants claim, and that demurrant now holds possession of the lands

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adversely to the rights asserted by the bill in behalf of complainant and her co-tenants.

It is entirely clear that under these averments demurrant Reilly cannot be brought into this court as a defendant in a suit for partition of the lands in question. Demurrant is made defendant solely because he is in possession of the premises adversely to the claim of right asserted in behalf of the co-tenants, and this court is, in effect, asked to retain him as defendant to the end that his wrongful possession may be adjudicated and the possession be restored to the legal title. That remedy is found in an action of ejectment. Demurrant is entitled to be dismissed.

I have not found it necessary to consider whether this court can properly entertain a bill for partition which on its face discloses that the premises are in the adverse possession of a stranger to the title under which the several co-tenants claim. Demurrant Reilly is not a proper party defendant and can have no interest in that question, as no rights of his can be affected by the subsequent proceedings in the suit.

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WILHELMINA D. BOWEN

v.

VIVIAN B. SMITH.

[Submitted November 5th, 1900. Decided November 20th, 1900.]

1. Where the owner of land lays it out into streets and lots, and adopts a restrictive covenant regarding the location and use of buildings to be erected on the lots, with a view to secure the defined conditions named in the covenant for the benefit of the entire tract which he seeks to develop, and inserts the covenant in all deeds as a part of the defined scheme and as an exaction from all purchasers for the benefit of each purchaser, the equitable right to enforce the covenant enures to each purchaser, irrespective of the time of his purchase.

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2. A restrictive building covenant in a deed of platted land, providing that it was the object of the covenants to secure and perpetuate the health, beauty and general improvement of the locality, and that it was expressly agreed that such covenants should run with the land, and that any subsequent conveyance should be made subject to the same covenants, &c., was a covenant for the benefit of the remaining portion of the grantor's land.

3. The record of a deed containing a restrictive building covenant was notice to all persons to whom the grantee's title subsequently passed.

4. The foreclosure of a mortgage, given by the grantee in a deed containing restrictive building covenants to the grantor, did not extinguish the notice given by the record of the deed that the grantee had bound himself and his heirs and assigns to the preservation of such covenants.

5. The equitable right to enforce restrictive building covenants may be lost by a degree of acquiescence in their violation amounting to an abandonment of the right of complainant.

6. A common grantor, who has parted with his title to a portion of the land for the benefit of which a restrictive covenant has been imposed on other land theretofore conveyed by him, may not thereafter release or modify the covenant so far as it operated to benefit the land previously conveyed.

7. Evidence held insufficient to show a loss by complainant of the right to enforce restrictive building covenants through failure to seek to enjoin the erection of certain buildings.

8. A covenant in a deed establishing a building line is valid.

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On bill for injunction to enforce restrictive building covenants.  
Heard on application for a preliminary injunction.

*Messrs. Thompson & Cole*, for the complainant.

*Mr. John B. Slack*, for the defendant.

LEAMING, V. C.

It is settled in this state that when an owner of a tract of land lays it out into streets and lots and adopts a restrictive covenant with reference to the location and use of buildings to be erected on the lots with a view to secure the defined conditions named in the covenant for the benefit of the entire tract which he seeks to develop, and inserts the covenant in all deeds as a part of the defined scheme and as an exaction from all purchasers for the benefit of each purchaser, the equitable right to the enforcement of the covenant enures to each purchaser irre-

spective of the time of his purchase. See *DeGray v. Monmouth Beach Co.*, 50 N. J. Eq. (5 Dick.) 329; *Morrow v. Hasselman*, 69 N. J. Eq. (3 Robb.) 612; *Barton v. Slifer*, 72 N. J. Eq. (2 Buch.) 812.

I think it unnecessary, however, to here consider the evidence in this case to determine to what extent rights may have arisen through any scheme adopted by either the Chelsea Beach Company or the Chelsea Land and Improvement Company for the development of the tract along the lines of a defined general plan, for the deed made to William T. Runkle by the Chelsea Land and Improvement Company, which deed contains the covenants now in question and under which deed defendant derives his title, was made prior to the conveyance by that company to Edward Geschke, under which conveyance complainant now holds through sundry mesne conveyances. In such case the right of the subsequent purchaser of all or a part of the remaining land of the common grantor for the benefit of which the covenant was made to enforce the covenant against the prior grantee and his grantees with notice has long been recognized in this state. I think the law of this state in the aspect last referred to is accurately summarized by me in *McNichol v. Townsend*, 73 N. J. Eq. (3 Buch.) 276, as follows:

"The equitable grounds on which restrictions of this nature may be enforced at the instance of a subsequent grantee of the common grantor are well defined. One owning a tract of land may convey a portion of it, and by appropriate covenant or agreement may lawfully restrict the use of the part conveyed for the benefit of the unsold portion, providing that the nature of the restricted use is not contrary to principles of public policy. In such case a subsequent purchaser of all or a part of the remaining land for the benefit of which the stipulation was made may in equity enforce the observance of the stipulation against the prior grantee upon the principle that the rights created by such stipulation are transferable as part of the land to which they are attached (*Coudert v. Sayre*, 46 N. J. Eq. (1 Dick.) 386), and such subsequent purchaser may in equity enforce the stipulation against a person who holds title under the prior purchaser, who has acquired title, with notice of the restriction,

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upon the principle which prevents a party having knowledge of the just rights of another from defeating such rights. *Brewer v. Marshall*, 19 N. J. Eq. (4 C. E. Gr.) 537, 542. As no privity exists between the subsequent purchaser from the common grantor and the original grantee or the persons holding under him, the right of action is necessarily dependent upon the existence of the fact that the stipulation was originally made for the benefit of the remaining land of the common grantor." *Rogers v. Hosegood* (1900), 2 Ch. 388, 404.

The covenants contained in the conveyance from the Chelsea Land and Improvement Company to William T. Runkle, defendant's predecessor in title, must be regarded as a covenant made for the benefit of the remaining portion of the land of the grantor. The language of the covenant permits no other conclusion. It is:

"Under the subject, nevertheless, to the covenants and conditions contained herein, which are hereby made a part of the consideration of this conveyance and are accepted herewith by the party of the second part.  
 \* \* \* It being the object of these covenants and agreements to secure and perpetuate the health, beauty, ornamentation and general improvement of the locality; it is expressly understood and agreed that the said several covenants on the part of the said party of the second part, above specified, shall attach to and run with the land, and any subsequent conveyance of the premises herein conveyed shall be made subject to the same restrictions and covenants as herein set forth, which shall be made a part of the said transfer or sale, and so stated in every deed, and it shall be lawful not only for the said party of the first part, its successors and assigns, but also for the owner or owners of any lot or lots adjoining in the neighborhood of the premises hereby granted, deriving title through the said party of the first part, to institute and prosecute any proceedings at law or in equity against the person or persons violating or threatening to violate the same; it being understood, however, that this covenant is not to be enforced personally for damages against the said party of the second part, his heirs or assigns, unless he or they be the owner or owners of the said premises or of some part thereof at the time of a violation of the said covenant or of a threatened or attempted violation thereof; but the said covenant may be proceeded in for an injunction of and for a specific execution thereof against the said party of the second part, his heirs or assigns, and for damages against the party or parties violating the said covenant or their heirs, executors or assigns."

The deed to Runkle containing these covenants was duly recorded and the record afforded notice to all persons to whom



Runkle's title subsequently passed. *Brewer v. Marshall*, 19 N. J. Eq. (4 C. E. Gr.) 537, 541; *Hayes v. Waverly and Passaic Railroad Co.*, 51 N. J. Eq. (6 Dick.) 345, 350.

Complainant's deed does not contain any restrictive covenants, but his title emanates through the deed from the Chelsea Land and Improvement Company to Geschke, above referred to, and that deed, which was duly recorded, contained restrictive covenants which were exactly the same as the covenants contained in the Runkle deed except that part of the covenants touching the size of the lots. The title of Geschke was thereafter extinguished by the foreclosure of a mortgage executed by him to his grantor, the block of land being purchased at the foreclosure sale by the land company, and the lot now held by complainant was therefore sold without restrictive covenants to one Culbert and by Culbert to complainant. But the foreclosure of the Geschke mortgage did not extinguish the notice which the record of the Geschke deed gives that Geschke had bound himself and his heirs and assigns forever to the preservation of the covenants contained in his deed. The Geschke covenants can be enforced against complainant to the same extent as they could have been had the title not again passed through the land company, for the second holding of the lots by the land company was under the Geschke covenants.

In the Runkle deed the covenants say:

"It is expressly understood and agreed by and between the parties hereto that the dimensions of the lots herein conveyed shall not be reduced in size."

In the Geschke deed that part of the covenant touching the size of the lots is:

"It being expressly understood and agreed by and between the parties hereto that the dimensions of the lots herein conveyed shall not be reduced in size smaller than forty feet front by one hundred twenty-five feet in depth on Montpelier and Chelsea Avenues, nor smaller than forty feet by ninety feet on Baltic and Sunset Avenues."

This difference in the language of the covenants touching the size of the lots manifestly arises by reason of the fact that the

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lots on the northwesterly side of Baltic (now Fairmount) avenue formerly fronted on the streets running northwesterly and southeasterly, the sides of the lots being on Baltic avenue. The map which disclosed lots on the northwesterly side of Baltic avenue as fronting on that avenue does not appear to have been filed until March 4th, 1908, but as the Geschke deed of November 1st, 1902, contemplates these lots as fronting on Baltic avenue, it seems manifest that the original plan as to the frontage of these lots had been modified as early as that date. That accounts for the change in that part of the covenant in the Geschke deed. Otherwise the covenants are the same as in the Runkle deed. It seems clear that this change in the frontage of lots on the northwesterly side of Baltic avenue, whenever it was made, could not operate to defeat complainant's right to the enforcement of the restrictive covenants in defendant's chain of title. Regarding the covenants in the Runkle deed as made for the benefit of the remaining portion of the land of grantor land company, I see no reason why that company could not exercise the right to change the subdivisions of the remaining portion of its lands to suit its purposes or even sell the remaining lots without restrictive covenants without in any way lessening its right or the right of its grantees to enforce the Runkle covenants. The theory upon which complainant's equitable right to enforce the covenant in the Runkle deed is sustained is set forth with great clearness in *Coudert v. Sayre*, 46 N. J. Eq. (1 Dick.) 386. I think complainant's equitable right to enforce the covenants in question is clear, unless it shall be found that she has lost the right through her acquiescence or through the acquiescence of her predecessors in title while owners of the lot now owned by complainant in the violation of similar covenants in other deeds.

The building which defendant is erecting is a brick building within one foot of the front property line of defendant's lot. The covenant in question is: "That no building shall at any time be erected nearer than twenty feet of the front property line of any street or avenue."

The lots of complainant and defendant are on opposite sides

of Baltic (now Fairmount) avenue and nearly opposite each other.

It is well settled that the equitable right to enforce restrictive covenants of this nature may be lost by a degree of acquiescence in their violation amounting to an abandonment of the right of complainant. In *Chelsea Land and Improvement Co. v. Adams*, 71 N. J. Eq. (1 Buch.) 771, Vice-Chancellor Bergen had occasion to say:

"If the original grantor of one hundred and fifty lots by deeds, with restrictions as to building lines, allows two-thirds of the grantees to violate it without protest, it cannot enforce it against a single grantee for the purpose of benefiting its remaining lands, for the grantee thus assailed is entitled to the common privileges accorded to other purchasers who are subject to like restrictions."

But the conditions stated in the language quoted differ radically from those presented by the present case. When a common grantor has parted with his title to a portion of the land for the benefit of which a restrictive covenant has been imposed on other land theretofore conveyed by the common grantor, it is not thereafter possible for the common grantor to release or modify the covenant, so far as it operated to confer a benefit on the land which he had previously conveyed. *Coudert v. Sayre*, *supra* (at p. 396). A town site proprietor, owning lots on various parts of the tract, may be directly interested in violations of such covenants upon any part of the entire tract and acquiescence on his part may appropriately deny to him the equitable right to enforce the covenants; but a violation of a restrictive covenant at a point on the tract distant from the lot of an individual lot owner may be of no interest whatever to such an owner and cannot appropriately call for affirmative action on his part. It seems to me clear that any claim of bar asserted against the rights of an owner of a single lot by reason of acquiescence in the violation of restrictive covenants of this nature must be measured in its force by the relation of the asserted violation to the individual lot. I am unable to discern any duty, the failure of performance of which should operate as an equitable bar, upon the part of an owner of a single lot on a tract of land similar to the one

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now in question, to apply to the courts for the enforcement of restrictive covenants the violation of which in no appreciable manner affect such owner. This was, I think, the view entertained by Vice-Chancellor Emery in *Morrow v. Hasselman*, 69 N. J. Eq. (3 Robb.) 612, and this view was followed by me in *Barton v. Slifer*, 72 N. J. Eq. (2 Buch.) 812, and again in *Brigham v. Mulock Company*, 74 N. J. Eq. (4 Buch.) 287. It may also be noted that the covenants in the Runkle deed, under which defendant holds, are defined as for the improvement of the locality and in express terms give the right of enforcement in a court of equity to owners of lots in the neighborhood of the lot granted.

The covenants contained in the Runkle deed embody a great number of restrictions. In addition to the restrictions already referred to, there are restrictions fixing the minimum cost of any building to be erected on the lot; that the top of the first floor joists of any building except stables shall not be less than seven feet and not more than eight and one-half feet higher than the grade of the sidewalk level; that only one building for dwelling-house purposes shall be built on a lot; that certain enumerated uses of buildings shall not be permitted; that double buildings must cost at least a certain amount; the location of stables are defined; sundry other details are also provided touching the uses permitted of buildings to be erected. The affidavits filed in behalf of defendant disclose that fifty-seven houses have been erected and are in course of erection on the tract in question, and point out all instances in which violations of any of the covenants have occurred. These violations include seven instances in which the height of the first floor joists of buildings are not within the limits defined. One instance is noted where three lots have been converted into four lots, and another where a lot "seems to have been diminished in size." Two chimneys are shown to extend over the side line restriction. Several buildings are shown to be used for storage. One building is used as an apartment house. A building at No. 104 Sovereign avenue is one and eight-tenths feet over the front building line, and another building on the same avenue has a second story which projects over the front building line, and a building at 114 Chel-

sea avenue projects seven feet over the front building line, and some violations of the side and rear lines covenants are also shown. The location where the violations already referred to have occurred are given by street numbers, and I am unable to accurately locate them, but they are manifestly all far from the lot of complainant and in no way affect the desirability of complainant's lot. There is also a brick structure at the rear of the lot adjoining defendant's lot, which is used for building boats, and the location of the building appears to violate the covenants relating to rear and side lines, and at the front of that lot is a shed which extends to the property line. This is the only violation of the covenants in which I think complainant can be said to be reasonably concerned. From the description of the shed, I do not think it proper to regard it as a structure of such a permanent or substantial nature as to justify the conclusion that its existence should operate to deny to complainant the privilege of asserting his rights against defendant. The rear or side line encroachments of the brick building is necessarily a matter of little or no concern to complainant. Such encroachments are of little interest to persons other than owners of adjacent lots. There are also several houses in process of erection on Sovereign avenue, northwesterly of Fairmount avenue, which extend five feet over the front building line. These buildings cannot reasonably concern complainant so far as the desirability of the property is concerned. Three buildings are also being erected on Fairmount avenue, southwesterly of Sovereign avenue, which extend five feet over the front building line. These are the only buildings on the avenue on which complainant's lot is situated which extend over the front building line, except the shed already referred to, and these buildings are now in process of erection. I do not think that complainant's rights against defendant can be properly considered as lost by reason of her failure up to this time to seek to enjoin the erection of the buildings last referred to. See *Bridgewater v. Ocean City Railway Co.*, 62 N. J. Eq. (17 Dick.) 276, 292; affirmed, 63 N. J. Eq. (18 Dick.) 798.

From this review of the facts touching violations of the covenants in the Runkle deed, it seems clear that there have been no such violations as have substantially changed the contemplated

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character of the neighborhood or have defeated the general purposes sought to be accomplished by these covenants. The locality is that of a summer seaside resort. The general purpose of the covenants, as stated in the Runkle deed, is "to secure and perpetuate the health, beauty, ornamentation and general improvement of the locality." So far as the important covenant which requires buildings to be set back twenty feet from the front property line is concerned, it appears that of about fifty completed buildings now on the tract nearly all have respected that covenant. In this view it approaches a question of public as well as private concern that the spirit of this covenant made to preserve the health and comforts of the neighborhood be maintained.

I have thus far referred to the covenant touching the building line as one creating only an equitable right in complainant to enforce its observation. A reference to the terms of the covenant will disclose that it not only declares its purpose to be to protect the health and beauty of the locality, but by its terms it is declared that the covenant shall attach to and run with the land, and that it shall be lawful not only for the grantor and its successors and assigns, but also for the owner of any lot in the neighborhood deriving title from or through the grantor to institute proceedings at law or in equity against any person violating or threatening to violate the covenant, except only that no action at law for damages shall be maintained against the grantee or his heirs or assigns, unless he or they be the owner of the premises or of some part thereof at the time of the violation of the covenant. The present case is therefore one in which the parties to the Runkle deed have, by their stipulations, agreed that the lot conveyed shall, as to the front twenty feet thereof, become permanently burdened with an easement in favor of the surrounding property to the end that the twenty feet referred to shall never be built upon, but shall remain open for the health and beauty of the neighborhood. The covenant is expressly defined as running with the land and as conferring on all persons holding lots in the neighborhood under the grantor the right to enforce the covenant either at law or in equity.

I am not aware of any policy of law against the creation of

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such an easement by the deliberative stipulation of the parties in interest. Indeed, covenants of this nature have been sustained and enforced when arising only by implication. See *Lennig v. Ocean City Association*, 41 N. J. Eq. (14 Stew.) 606. In this view complainant may be regarded as the owner of a legal estate, the existence of which is not in substantial dispute, and as now seeking in this court the preservation of that estate, and not merely as the owner of an equitable right unsupported by an interest in the land of defendant.

The application of complainant for relief was promptly made. I think I must take judicial notice of the fact that the bill was presented to me some days before the writ issued, and was thereafter redrafted by reason of certain errors of the stenographer who copied into the first bill erroneous data relating to the covenants.

I will advise a preliminary injunction against the construction of defendant's building nearer than twenty feet to the front property line.

As the other covenant here sought to be enforced relates to the use of the building, I see no necessity of considering that question at this time.

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PETER SCHWOEBEL

v.

WILLIAM A. STORRIE et al.

[Submitted November 30th, 1909. Decided December 11th, 1909.]

1. A motion to dismiss a bill under rule 213 assumes that all the material averments of the bill are true.

2. When facts are brought to the knowledge of one contemplating the purchase of the record title sufficient to apprise him of the existence of an outstanding claim of title, and a reasonable investigation of such facts would necessarily disclose the existence of such title, he is put on inquiry

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and charged with notice of the facts which a reasonably diligent investigation would have ascertained.

3. Open, visible, notorious, and exclusive possession of land by one who is not the record owner affords notice to one who purchases the record title which puts him on inquiry, and charges him with the knowledge of those facts which a reasonably diligent investigation would have ascertained.

4. Where in 1891 a mistake was made in the description of the property in a deed, as also in subsequent conveyances, but one claiming under it and intervening conveyances did not know of the mistake until 1906, his suit, brought in 1909, for reformation, was not barred by laches.

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On bill to reform deeds. Heard on motion to dismiss bill for want of equity and for laches.

Complainant seeks to reform a deed of conveyance made to him for certain real estate, and also to reform the deeds made to his grantor and to his grantor's grantor, respectively, for the same land. The bill avers that the mistake in the deed made to complainant and in the other deeds in complainant's chain of title arose as follows: On November 5th, 1891, Keturah Mullica owned a tract of land fronting on Broad street, Woodbury, New Jersey, which tract was divided into two lots by a fence extending across the tract at about right angles to Broad street. Mrs. Mullica at that time resided in a dwelling-house on the lot on the northerly side of the fence, and on the date named sold the lot on the southerly side of the fence to Elizabeth Brandt. The description of the land contained in the deed of conveyance was intended by the parties to extend to the fence above referred to and thus make the fence the division line between the parties, but by reason of an error in the description the land actually covered by the language of the deed extends only to a line parallel with and five feet southerly of the fence. June 3d, 1892, Elizabeth Brandt (the grantee referred to) sold the lot to Anna M. Latham. The deed made on that date contained the same erroneous description, and, in consequence, by its terms only extended to a line five feet southerly of the division fence already referred to. October 2d, 1905, Anna M. Latham (the grantee last referred to) sold the lot to complainant. The deed made on that date followed the same erroneous description. The description



contained in each of the three deeds was intended by the parties to extend to the fence and was by the parties believed to extend to the fence. Each of the grantees named have, during their respective ownerships, been in actual and open possession of the five-foot strip which was omitted by the erroneous description, as possession of the entire southerly lot up to the fence was taken under the Mullica deed and has been continuously maintained until this time. All of the deeds referred to were promptly recorded.

By deed dated February 10th, 1906, the heirs of Mrs. Mullica conveyed to William A. Storrie the northerly lot referred to and also the five-foot strip southerly of the fence which was erroneously omitted from the deeds of complainant and his predecessors in title. Complainant and his respective predecessors in title believed that the description in their respective deeds extended to the fence until after the purchase by Storrie, when complainant was made aware of the errors in the several descriptions by a claim to the five-foot strip then asserted by Storrie. November 15th, 1907, Storrie brought an action of ejectment against complainant for the recovery of the five-foot strip southerly of the fence and recovered judgment February 16th, 1909. The present bill seeks to stay the execution of that judgment and to reform the errors of description referred to.

In addition to the averments contained in the bill that complainant and his predecessors in title have been in continuous and open possession of the five-foot strip now in dispute, since the time the deed was made by Mrs. Mullica to Elizabeth Brandt, the bill avers as follows:

"And your orator further shows that the said William A. Storrie, prior to his purchase of the said tract of land knew that your orator was in possession of the said five-foot strip, and that your orator claimed ownership of same."

Defendant Storrie now moves to dismiss the bill for want of equity and for laches.

*Mr. John Boyd Avis*, for the complainant.

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6 Buch.Schwoebel v. Storrie.

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*Mr. Thomas G. Hilliard and Mr. Howard B. Keasbey, for the defendants.*

LEAMING, V. C.

The present motion, which is made to dismiss the bill under rule 213, necessarily assumes that all of the material averments of the bill are true.

The right of complainant to the reformation of his deed and of the deed made to his grantor, and of the deed made to his grantor's grantor, as against all persons other than defendant Storrie, is not questioned. The deed from Mrs. Mullica to Mrs. Brandt conveyed, in equity, all that the parties mutually intended it to convey. In like manner the subsequent deeds to Mrs. Latham and to complainant conveyed all that the respective parties intended them to convey. Complainant is therefore the equitable owner of the entire lot which the respective parties referred to intended to convey. The heirs of Mrs. Mullica inherited only the rights of their ancestor.

The equitable estate of complainant in that part of the lot which is not covered by the terms of the description in his deed would necessarily be lost, by force of our recording statute, as against a subsequent *bona fide* purchaser not having notice thereof at the time of his purchase. But that statute affords no protection to a subsequent purchaser with notice. The notice contemplated by the recording statute as sufficient to defeat its protection to a subsequent purchaser need not, in itself, apprise the purchaser of all the facts touching the outstanding title. When facts are brought to the knowledge of the person contemplating the purchase of the record title which are sufficient to appraise him of the existence of an outstanding claim of title, and a reasonable investigation of such facts would necessarily discover the existence of such outstanding title, the purchaser is put upon inquiry and charged with notice of the facts which a reasonably diligent inquiry would have ascertained. It is also well settled that the open, visible, notorious and exclusive possession of land by one who is not the record owner affords a notice to one who purchases the record title which puts such

purchaser upon inquiry and charges him with a knowledge of such facts as a reasonably diligent inquiry would have ascertained. *Diehl v. Page*, 3 N. J. Eq. (2 Gr. Ch.) 143, 145; *Van Keuren v. Central Railway Co.*, 38 N. J. Law (9 Vr.) 165, 167; *Havens v. Bliss*, 26 N. J. Eq. (11 C. E. Gr.) 363, 370; *Johns v. Norris*, 27 N. J. Eq. (12 C. E. Gr.) 485, 487; *Wanner v. Sisson*, 29 N. J. Eq. (2 Stew.) 141, 150; *Cooke v. Watson*, 30 N. J. Eq. (3 Stew.) 345, 352; *Essex County Bank v. Harrison*, 57 N. J. Eq. (12 Dick.) 91, 96; see, also, 2 Pom. Eq. Jur. §§ 614, 615; 2 Dev. Deeds §§ 760, 777.

The rule as stated in *Allen v. Seckham*, 11 Ch. Div. 790, 795, is: "Where a person purchases property where a visible state of things exists which could not legally exist without the property being subject to some burden, he is taken to have notice of the extent and nature of the burden."

In the present case the bill not only avers that the land in question was "openly occupied, used and enjoyed" by complainant at the time of the purchase by defendant Storrie, but also that defendant Storrie knew that complainant was in possession and claimed to own the land. Under the circumstances stated defendant Storrie would have necessarily ascertained the nature and extent of complainant's rights had an inquiry been made of complainant for that purpose. Defendant Storrie cannot, in consequence, be regarded as a purchaser without notice of complainant's equitable estate.

The bill discloses no laches which should operate to defeat the relief sought by complainant. Complainant did not know of the mistake until after the purchase by defendant Storrie in the year 1906. His possession has continued since that time and no equities have intervened. *Ruckman v. Cory*, 129 U. S. 387.

I will advise an order denying the motion of defendant.

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6 Buch.Jordan v. Logue.

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## ALBERT M. JORDAN

v.

WILLIAM A. LOGUE, substituted administrator, &amp;c., et al.

[Submitted November 4th, 1909. Decided December 28th, 1909.]

1. A creditor whose claim has been barred by a rule of the orphans court barring creditors, cannot maintain a bill in the court of chancery to draw the administration into that court, in the absence of averments in the bill showing the necessity therefor.

2. Statutory rights of such barred creditor defined.

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On demurrer to bill.

*Mr. Edward Ambler Armstrong and Mr. Clarence L. Cole,*  
for the demurrants.

*Mr. John J. Crandall,* opposed.

LEAMING, V. C.

I am unable to conclude that a court of equity should entertain the present bill. The remedies afforded to complainant by the courts of law appear to be entirely adequate, and I find no reason for the exercise of equitable jurisdiction.

Complainant's rights and remedies as a creditor, who has failed to file his claim with the administrator of his debtor prior to the entry of the rule to bar creditors, appear to be well defined.

So far as the personal estate of the deceased debtor is concerned, the effect of the rule to bar is defined by section 70 *et seq.* of the Orphans Court act. *P. L. 1898 p. 740 et seq.* If there is a surplus at the settlement of the estate, such creditor may then present his claim to the administrator and be paid to the extent that the surplus is found sufficient for that purpose. If the claim so presented is disputed by the administrator, distribution is suspended until suit is brought to determine the validity of the

claim. Such a creditor is also entitled to be paid, ratably with other like creditors, from such assets as he may find which have not been accounted for at final settlement. When an administrator without reasonable cause fails to make final settlement of his account within one year, or apply for a decree of distribution within three months after final settlement, the orphans court may extend to such creditor the same relief he would be entitled to in case the final account had been passed and refunding bonds taken for legacies and distributive shares. Under this section (section 80) it has been held that the barred creditor has a status which enables him to except to the accounts of an administrator. *Equitable Life v. Chelsey*, 63 N. J. Eq. (18 Dick.) 219; S. C., 64 N. J. Eq. (19 Dick.) 348. The act also affords protection to barred creditors by a requirement of refunding bonds for their benefit when distribution is made by an administrator.

As to real estate, which passes to heirs and devisees, our statute for the relief of creditors against heirs and devisees (2 Gen. Stat. p. 1679) renders such heirs and devisees liable to creditors of the testator or intestate to the extent of assets by them severally received. The remedy under this statute is at law. *Mutual Life Insurance Co. v. Hopper*, 43 N. J. Eq. (16 Stew.) 387, 389; S. C., 44 N. J. Eq. (17 Stew.) 604; *Edwards v. McClave*, 55 N. J. Eq. (10 Dick.) 151, 155; S. C., 55 N. J. Eq. (10 Dick.) 822; *Acton v. Schultz*, 69 N. J. Eq. (3 Robb.) 6, 8.

With these rights and legal remedies afforded to a creditor whose claim has been barred by a rule of the orphans court barring creditors, I am unable to discern wherein the present bill discloses a necessity for the intervention of this court. In so far as the purpose of the bill may be to draw the administration of the estate to this court, it fails to present any special reasons calling for such action. It is well settled that while this court may assume jurisdiction, to the exclusion of the orphans court, in the settlement of accounts of executors and administrators in any case where the ends of justice may seem to require it, it should not do so where any progress has been made in the orphans court for that purpose unless there is shown some good reason for such course. See *Filley v. Van Dyke* (Court of Errors and Appeals), 75 N. J. Eq. (5 Buch.) 571, and cases there collected.

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6 Buch.Jordan v. Logue.

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The present bill suggests no maladministration or negligence or irregular conduct or conflict of interests, or even complicated features in connection with the settlement now in progress in the orphans court. If a discovery of assets is necessary this court might appropriately assume jurisdiction for that purpose, but the bill does not disclose that necessity; and before this court is called upon for that purpose, it should at least appear that assets may exist which could not be ascertained by a mere inquiry from the parties from whom discovery is sought. The bill also avers that "the resources of the said inventory largely exceed the debts and legal claims against the same." If this be true, complainant's claim, if established, will be paid by the administrator at final settlement. If, however, there is danger that the surplus of personal assets, after the payment of the claims filed within the statutory period, will be insufficient to pay complainant's claim, this court might appropriately enjoin the sale of real estate by the heirs and devisees, if danger of such action on their part exists. The personal property is primarily liable for the payment of debts, and an heir is entitled to have it so applied; at the same time a creditor is entitled to have the real estate applied to the payment of debts if the personal property is insufficient. But the bill fails to show a probable insufficiency of personal assets and discloses no attempt to ascertain the possibility of such deficiency, and does not seek injunctive relief of the nature suggested. The obvious purpose of the bill is to remove the administration of the estate from the orphans court to this court. I see no advantage to be gained by such course. In an administration in this court the assets must be applied as they would be applied in the probate court. *Coddington v. Bispham*, 36 N. J. Eq. (9 Stew.) 574, 578; *Edwards v. McClave*, *supra*. In the absence of averments in the bill disclosing a necessity for the removal of the administration to this court, I am unable to conclude that this court can properly grant any relief under the bill as framed.

This view renders it unnecessary to consider the question of non-joinder.

I will advise an order sustaining the demurrer.

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Warwick v. Warwick.

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76 Eq.

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MOSES HENRY WARWICK, petitioner,

v.

CLARA ESTELLA WARWICK.

[Heard January 3d, 1910. Determined January 5th, 1910.]

At final hearing of a suit for divorce against a wife for adultery, her guilt was ascertained and a decree *nisi* was entered. On motion of complainant a prior order for the payment of alimony *pendente lite* was suspended.

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On motion to terminate order for alimony.

Mr. V. Claude Palmer, for the motion.

Mr. Ralph N. Kellam, opposed.

LEAMING, V. C.

Pending a suit for divorce by the husband against his wife on the grounds of adultery an order was made directing the husband to pay to his wife certain alimony for her support and maintenance until the termination of the suit. At final hearing the wife was found guilty of adultery as charged and a decree *nisi* was entered pursuant to our statute. Complainant now moves for an order terminating the order for the payment of alimony *pendente lite*.

While I entertain the view that the decree *nisi* should not be treated as operative, of its own force, to discharge the order for alimony, I think it entirely clear that in a case where at final hearing this court ascertains the facts to be of such a nature that alimony *pendente lite* could not have been appropriately allowed had such facts been known to the court when the order for alimony *pendente lite* was made, this court should, on application made for relief against the outstanding order, terminate such order. The decree *nisi* adjudges the wife guilty of adultery.

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6 Buch.Simpson Plumbing & Heating Co. v. Geschke.

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At the end of the statutory period the bonds of matrimony will be dissolved unless some cause is shown in the interim why a final decree to that effect should not be then entered. The adjudication of guilt is final, so far as this court is concerned, in the absence of cause shown for relief against that adjudication. It seems manifest, therefore, that the order for alimony *pendente lite*, which was made upon the assumption of innocence on the part of the wife, should be now terminated, in the absence of any cause shown by her why doubts should be entertained touching the adjudication which was made at final hearing.

I will advise an order discharging the order for alimony *pendente lite*.

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LIONEL C. SIMPSON PLUMBING AND HEATING COMPANY

v.

EDWARD GESCHKE.

[Heard January 24th, 1910. Determined January 25th, 1910.]

A contract embodied in a letter written by the complainant to the defendant in compliance with defendant's request purporting to contain a memorandum of the terms of an oral building contract between the parties, theretofore entered into between them, but which did not correctly embody the terms of the real contract owing to the mistake of the complainant, will be reformed, where it appeared that the defendant either did not observe the error in the writing, and hence the writing embodied a mistake on his part, or did observe the error in the writing and failed to disclose that fact to the complainant. under circumstances constituting such unconscientious or fraudulent conduct on his part as to entitle complainant to the relief of reformation.

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On final hearing. On pleadings and proofs.

Mr. Howard L. Miller, for the complainant.

Mr. Ralph W. E. Donges, for the defendant.



LEAMING, V. C. (orally).

I do not entertain the slightest doubt touching the facts in this case. It not infrequently happens that where testimony is in conflict I find considerable difficulty in arriving at a conclusion which is entirely satisfactory to me touching the facts concerning which the testimony is in conflict, but in this case I have no doubt whatever touching all that has transpired, notwithstanding the conflict in the testimony. The facts undoubtedly are that in July, 1907, Mr. Stuart, representing the complainant company, orally submitted to defendant, Geschke, a bid of \$280 per house for this work, and that Mr. Geschke at that time told him the price was too high, and told him that he had received a bid from another party, which was considerably lower, so much lower that it represented in its difference what was equivalent to the cost of papering; Mr. Stuart then undoubtedly requested the right or privilege to revise his figures and submit another bid, and that request being acceded to, he returned to the house, which he represented, and went over the matter in detail with Mr. Simpson, the president of complainant company; the result of their joint examination of the details of the figures, on which the first bid had been based, was a determination to submit a second bid of \$265 per house, and Mr. Stuart was authorized to make that bid in behalf of complainant company; he accordingly, on the same day, returned to defendant, Geschke, and told him that on a revision of the figures they had determined to make the bid \$265 per house; Geschke said that that was satisfactory and accepted the bid and directed that the complainant company proceed with its work, and the work was accordingly begun under what was a parol contract between the parties, whereby the complainant company was to do this work and was to charge for it \$265 per house. It is undoubtedly also a fact that subsequently, and after the work was in progress, Mr. Geschke asked that a statement be sent to him, in writing, containing a memorandum of the terms of the contract, in order that he could have possession of such a statement for his use, and, accordingly, the letter which is now in question, under date of July 25th, 1907, was written by complainant company to the defendant in compliance with defendant's request. That letter

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6 Buch.Simpson Plumbing & Heating Co. v. Geschke.

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unquestionably contains a mistake, which has arisen through the inadvertence of someone, probably of the typewriter, but it matters not through whose inadvertence; the letter contains the terms of \$165 per house, instead of \$265 per house as had at that time been agreed upon. Subsequently, a settlement was made between the parties under the assumption that \$165 per house was the amount agreed upon, and the money was paid by defendant at that rate and a receipt given which was intended to be a receipt in full.

These are, to my mind, facts which are established by the testimony in this case so clearly, when all the circumstances are considered in connection with the testimony, that, as already stated, I entertain no doubt on the subject whatever.

The suit is to reform the written agreement which is embodied in the letter already referred to. Where the basis of reformation is that of mistake, the mistake must be a mutual mistake, but a reformation may also be had where there has been a mistake upon the part of one party and unconscientious conduct upon the part of the other in the nature of a concealment of the mistake. As already stated, the real contract between the parties, the contract which was not reduced to writing, was \$265 per house. The letter which was intended to take the place of the parol contract and to be operative as a written contract, was not a new contract at all, for there had been no further negotiations or change of terms, but was intended as a writing to embody the terms of the fixed parol contract; neither of the parties had any purpose or expectation or design to accomplish by or embody in the writing anything different from that which had been orally agreed upon. That writing affords the conclusive evidence of the contract unless it is reformed, as that writing was adopted by the parties as embodying the terms of the real contract; it was sent out by the complainant company as its agreement; it was received by the defendant as embodying the terms of the agreement; it was acted upon by the parties in making their settlement, and was, in every sense, adopted by both of the parties as the written contract, or, rather, as a written contract correctly embodying the terms of the parol contract, whereas, in fact, it did not correctly embody the terms of the real contract

between the parties. So far, therefore, as the complainant is concerned, the written contract contained a mistake; so far as the defendant is concerned, if he did not observe the error in the writing, then the writing embodies a mistake upon his part; if the defendant did observe the error in the writing, then his failure to disclose that fact to complainant constituted such unconscientious or fraudulent conduct upon his part as to entitle complainant to the relief of reformation; so that, so far as the defendant is concerned, it is utterly immaterial whether he failed to notice the mistake, as did complainant, or whether he discovered the mistake and failed to communicate it.

In a court of law this written contract, which the proofs fully show has been adopted by the parties as the contract controlling their conduct, would be conclusive evidence of what the real agreement had been, and it is the special province of a court of equity to correct any errors or mistakes which have crept into a written agreement of this nature, and for that purpose the relief which is here sought, in the nature of reformation, is appropriately sought.

I do not know that it will be advantageous to comment upon the details of the testimony which lead me to these conclusions of fact, but I should say, I think, that the testimony of Mr. Stuart, and also of Mr. Simpson, has impressed me as testimony that cannot reasonably be doubted, whereas, on the other hand, the testimony of Mr. Geschke satisfies me, in many ways, that the testimony opposed to his statements must necessarily be true. There cannot be the slightest doubt that two bids were submitted, first, the higher bid of \$280 per house, then, the second, the lower bid of \$265 per house. Mr. Geschke did not question that fact when the matter was under negotiation between the parties for the purpose of adjustment; he then undoubtedly admitted and well remembered that he had turned down the higher bid and asked for a lower one, and even stated to Mr. Simpson that his statement made at that time, to the effect that he had received a bid from another party, was a "bluff;" there can be no doubt of that having transpired, and yet Mr. Geschke at this time denies it, and denies what it does not seem to me he can very well help remembering. I am satis-

fied also from the testimony of Mr. Stuart and Mr. Simpson that when this matter was first brought to the attention of Mr. Geschke for the purpose of adjustment, that Mr. Geschke did not seriously claim that \$165 per house was the real contract amount; his claim at that time undoubtedly was that it was then too late for a mistake to be corrected, but as negotiations continued, he gradually grew to an attitude of greater resistance; first he said that he would abide by the decision of Mr. Stuart, and when Mr. Stuart's decision was against him he still further retracted, until finally a suit at law became necessary. His letter written to Mr. Simpson, in which he says that the more he thinks of it the more he is satisfied that \$165 was the amount of the original bid, shows, I think, about the course of his mental process; originally he was not sure and did not undertake to assert that the original bid was \$165; as time has gone on, he has grown more positive of the fact until, to-day, he is prepared to testify, and did testify, that when the bid was first offered he was "struck" with it—that is, that the bid as originally presented struck him as a peculiarly favorable bid, and was adopted by him at once. Now, I say, his testimony in that respect is not consistent with what was manifestly the course of the dealings between the parties; there were undoubtedly two bids, and the conditions undoubtedly arose just as the complainant and his witnesses have indicated, and all of the earmarks of the case so firmly confirm that view that I am entirely satisfied it is the only correct solution.

I will, therefore, advise a decree pursuant to the prayer of the bill. The action in the law court may now proceed to trial.

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Brunson v. Board of Freeholders of Somerset.

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76 Eq.

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AUGUSTUS J. BRUNSON

v.

THE BOARD OF FREEHOLDERS OF SOMERSET COUNTY.

[Decided October 25th, 1909.]

Where the title to land sought to be taken to widen a highway was in dispute and complainant was in the actual possession claiming title, which was not clearly in the board of freeholders of the county, complainant would be granted a preliminary injunction restraining the board from taking possession of the strip until their legal right had been settled; it appearing that to withhold the injunction would destroy complainant's freehold, to his irreparable injury.

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On motion for preliminary injunction.

*Mr. J. Edward Ashmead and Mr. Richard V. Lindabury, for the motion.*

*Mr. John A. Frech, contra.*

HOWELL, V. C.

The complainant is the owner of a tract of land which lies along the northerly side of a public highway in Somerset county leading westerly from North Plainfield. The highway is called Green Brook road and runs in a course substantially east and west and was originally laid out in 1796 as a two-rod road. The board of freeholders are now engaged in improving the highway by widening, grading and macadamizing it. In the course of the widening the county finds it necessary to take possession of and to grade a strip of land running the whole length of the complainant's property on which are standing twenty-five trees of several varieties which were set out many years ago and have now attained great size. The complainant filed his bill to prevent the freeholders from taking this strip of property and the

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*6 Buch.**Brunson v. Board of Freeholders of Somerset.*

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trees thereon upon the ground that the title thereto and the possession thereof are vested in himself, and that no proceedings have been taken to condemn the said land or any part thereof, and that therefore the trespass is without compensation and is without his consent. The defendant meets this allegation by two statements—*first*, that the strip of land in question is within the boundary lines of the old two-rod road, and *second*, that the complainant in 1903 dedicated the land in question to public uses for the purpose of a public highway.

As to the first defence, viz., that the line is within the line of the old road, an affidavit is produced made by an engineer who surveyed or attempted to survey the centre line of the old highway, taking his data from the return of the highway surveyors made in 1796. He accompanies his affidavit with a map which shows the northerly line of the old location to include the strip of land in question and the trees.

As to the second defence, viz., dedication, the defendants say that, in 1903, the complainant joined with his neighbors in a declaration of dedication which was endorsed upon a map entitled "plan and profile of Green Brook road showing proposed widening and improvement from West End avenue to Rock avenue, borough of North Plainfield, April, 1903." This map shows the proposed road as widened, and I understand the allegations of counsel to be that if the road were widened in accordance with the notations of this map it would include the very land in question. The endorsement on the map reads as follows:

"We, being collectively the owners of all the land shown on this map, do hereby dedicate to the public so much thereof as lies within the solid black lines, being also thirty-five (35) feet on each side of the solid red line marking the centre line of Green Brook Road, widened, as shown on the map, for use as a public highway or driveway forever, said roadway or driveway to be from curb to curb seventy feet in width forever. Dated June, 1903."

This is signed by the complainant and eight other property owners, and was filed in the office of the county clerk of Somerset county on August 15th, 1903, but for some unexplained reason was afterwards taken from the files by some unknown person and the filing mark erased; it was eventually found a couple of years

ago in a desk in the common council chamber of the borough of North Plainfield. Two days after the filing of the map, and on August 17th, the borough of North Plainfield, within whose boundaries the lands in question lie, passed a resolution as follows:

*"Resolved, That the dedication of Green Brook Road from West End Avenue to Rock Avenue as shown on map entitled 'Plan and profile of Green Brook Road showing proposed widening and improvement from West End Avenue to Rock Avenue, Borough of North Plainfield. April 1903,' and signed by Charles F. Debele, Charles Arnold and others, be and the same is hereby accepted in accordance with the dedication endorsed on said map, and also that the said map be filed with the Borough Clerk."*

The freeholders claim that this declaration, signed by the complainant and endorsed upon the map, was a tender of a dedication which was accepted by the said resolution and thereby and thereafter became and was valid and effective to constitute a highway seventy feet in width.

To these two defences the complainant replies as follows: To the defence that the land was within the lines of the old road, the complainant says that it was impossible for the engineer who surveyed the line for the defendants to be sure of a proper location thereof for the reason that the return of the surveyors of the highway in 1796 mentioned no monuments and that therefore the line is indeterminate. The engineer responds to this by saying that he found certain monument stones from which he started his survey, but it appears by the testimony that at least one of these monument stones was a stone about seven inches in diameter with a rude cross cut upon the top of it which lay near the surface of the ground and was liable to be pushed about and moved when the ground was soft by the collision of the wheels of heavy wagons with it.

And as a further reply to the first defence the complainant says that he lived upon the premises for upwards of thirty years; that he remembers the location of the ancient fence lines; that in the early times the fence line included within the limits of the Brunson farm all the land in question and all the trees thereon, and that the roadway was wholly south of this fence

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6 Buch.Brunson v. Board of Freeholders of Somerset.

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line; that it was thirty-three feet from fence to fence, and that the line of the highway which was used by travelers was midway between the two fences. This the complainant says was a practical location of the side lines of the highway and that having existed so long in the particular location, no court ought now lightly to disturb the situation.

In this statement of practical location the complainant is supported by several people who have long recollections of the situation of the roadway and the fences at this particular point.

As to the defence of dedication the complainant admits that he signed the declaration which appears upon the map, but says that he signed it and delivered it upon the condition that the work of improving the road to the width of seventy feet should be begun immediately, that is in 1903, and claims that inasmuch as the delivery was upon a condition which was not performed, there was no delivery in the law, and that the fact that the map was withdrawn from the clerk's office and the filing mark erased is evidence that it was understood that the conditions imposed by the complainant upon the delivery had not been complied with, and that therefore the dedication was null and void, and they rely upon the principle enunciated by Vice-Chancellor Pitney in the case of *O'Brien v. Paterson Brewing and Malting Co.*, 69 N. J. Eq. (3 Robb.) 117.

It thus appears that the question involved is a question of title and that every proposition advanced by either complainant or defendant is in dispute.

Under these circumstances the question arises whether this court ought to permit the freeholders by force and arms to take possession of a strip of land of which the complainant is now in actual possession and to which he claims title, and the title to which is not clearly and manifestly in the board of freeholders.

To restrain such action would be to hold the *status quo* until the legal right could be settled. To withhold the injunction would be to permit the public corporation to appropriate lands to which it has not a clear title and to virtually put it in the possession thereof. If it should be permitted to thus enter into possession and construct its highway over the land such action



would destroy the complainant's freehold and work an irreparable injury.

Such action was restrained by Chancellor Kent in *Varick v. New York*, 4 Johns. Ch. 53. There the owner had been in possession for upwards of twenty-five years. The city of New York began an excavation upon land so in his possession, claiming that certain acts of the former proprietors in laying out streets amounted to a cession of them in law to the people and through them to the corporation, the proof of which, however, was not clear. The injunction was continued until the city should have established at law its rights to the ground in question. That case was followed in this state by Chancellor Runyon, in the case of *Manko v. Chambersburg*, 25 N. J. Eq. (10 C. E. Gr.) 168. There the city of Chambersburg attempted to remove a brick building which the complainant had erected on his lot on what he insisted was the true westerly line of the street. The municipal corporation, on the other hand, insisted that it encroached upon the street to the depth of five feet nine and a half inches. It appeared there that the complainant had been in possession for about fifty years and that for upwards of twenty-five years the road fence had been maintained on a line with the so-called obstruction. The injunction which had been granted on the filing of the bill was continued until the final hearing. The case comes within the rule laid down in *Hart v. Leonard*, 42 N. J. Eq. (15 Stew.) 416; 1 High Inj. § 363.

The result is that a preliminary injunction will issue in accordance with the prayer of the bill.

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6 Buch.Rheinfort v. Abel.

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GEORGIANA RHEINFORT et al

v.

LIZZIE ABEL.

[Decided October 27th, 1909.]

1. An answer under oath made to a bill praying for an answer under oath may be amended in matters of form or as to mistakes of dates or verbal inaccuracies; but an amendment in which defendant shifts his ground of defence cannot be allowed, as he must make a true and exhaustive answer at the earliest opportunity.

2. An answer under oath which denies the complainant's peaceable possession of land, and which alleges that defendant executed a deed of the land at a time when she was the wife of B., who did not join in the deed, may be amended by alleging that at the time of the execution of the deed she was the wife of S., who did not join in the deed.

3. A cross-bill must be supported by an answer.

4. Where the answer under oath to a bill praying for an answer under oath alleged that defendant executed a deed of the land in 1874 while married and that her husband did not join, but did not mention a deed made by her in 1870, an amended answer setting forth the deed made in 1870 could not be allowed.

5. The original answer under oath made to a bill praying for answer under oath will remain on file as evidence notwithstanding the filing of a supplemental answer and cross-bill, and complainant may use it to attack the credibility of defendant or otherwise.

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On motion for leave to file an amended answer and cross-bill.

*Mr. Alexander P. Maxwell*, for the motion.

*Mr. James C. Connolly*, *contra*.

HOWELL, V. C.

The bill in this case is a bill to quiet title under the act of 1870. It prays for an answer under oath. The defendant, by the name of Elizabeth Bauerman, filed her answer under oath, denying the complainant's peaceable possession of the land for

upwards of twenty years and alleging that she executed a deed in 1874 without consideration for the land in question or some portion of it, which deed became and is a part of the complainant's title; that she signed the same with her maiden name, Lizzie Abel, and that her husband, John G. Bauerman, did not join, and that no title passed thereby, and she claimed title to a portion of the lands in question, which she describes in her answer. She now moves, under the name of Elizabeth Schell, to file an amended answer and a cross-bill in which answer she proposes to deny title and possession in the complainant and to allege that at the time she signed the deed in question she was the lawful wife of Peter A. Schell, and that her husband did not join in the deed, and that therefore no title passed, and by way of cross-bill prays that the deed of 1874 may be declared void, and that another deed made by her in 1870 affecting the complainant's title may also be declared void, and that she may be restored to her estate—an undivided one-half interest in the lands in question.

The difficulty attending the amendment of an answer or the filing of a supplemental answer is strongly illustrated by the cases referred to in *1 Dan. Ch. Pr.* 777. While amendments in matters of form or mistakes of dates or verbal inaccuracies are very easily allowed, no amendment can be permitted in which the defendant entirely shifts his ground of defence, the reason being that the answer is a disclosure under oath of facts within the memory of the answering defendant, and that it is the duty of the answering defendant to make a true, complete and exhaustive answer at the first and earliest opportunity. The answer proposed to be filed in this case differs from the answer now on file in these particulars. In the first answer she alleges that at the time of the execution of the deed she was the wife of John G. Bauerman; in the second that she was then the wife of Peter A. Schell; but neither husband having joined with her in the deed I do not see how that variation can materially affect the complainant's case. In the proposed cross-bill she asks that there be set aside not only the deed of 1874, but also a deed made by her in 1870. Inasmuch as a cross-bill must be supported by an answer, and inasmuch as her first answer makes no mention

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of the deed of 1870, and she cannot be permitted to amend her answer in this regard, she consequently cannot be permitted to make any allegations with respect to the deed of 1870 in her cross-bill.

Under ordinary circumstances I would not advise any order permitting the filing of any pleading by the defendant which would change her attitude toward the complainant or permit her to shift the grounds of her defence, but in this case the rights and interests of all the parties to the tract of land should be dealt with and settled finally, and it is only with this view that the defendant should be permitted to make any change whatever.

With these limitations I will advise an order permitting a supplemental answer and cross-bill to be filed, but the answer now on file will so remain. This is but fair to the complainant, who may use the answer for the purpose of attacking the credibility of the defendant, or otherwise as he may be advised.

The order must be taken and the new pleadings filed on or before October 16th, 1909, and the defendant must furnish the complainant gratis with copies within the same time. The defendant must also within the same time pay the complainant's costs of this motion as a further condition, provided the complainant shall have the same taxed and served. The order will embrace all these conditions.

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PAULINE SCHULTZ VON BERNUTH

*v.*

FREDERICK AUGUSTUS VON BERNUTH, JR.

[Submitted October 27th, 1909. Decided November 11th, 1909.]

1. Defendant in a suit for divorce may plead in bar a matrimonial offence committed by complainant which accrued after the filing of the original bill.

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2. A defendant in a suit for divorce may plead by cross-bill a matrimonial offence, entitling him to a divorce, which had not accrued when the original bill was filed, but which did accrue prior to the filing of the cross-bill, and obtain the same relief which he might have obtained by filing an original bill as of the same date.

3. Where plaintiff in a suit for divorce was a *bona fide* resident of New Jersey, and defendant, a resident of New York, duly appeared and answered, the court had jurisdiction to grant defendant a divorce on a cross-bill without personal service of process on the original complainant under chancery rule 206a providing for relief to defendants in chancery, in so far as the same had not been modified by the Divorce act.

4. Where a wife in a bill for divorce made charges of matrimonial offences against her husband sufficient, if true, to have warranted his indictment and punishment by the criminal courts, and repeated and enlarged the same in an amended bill, but on the trial after the filing of a cross-bill by the husband demanding a divorce for desertion, which did not accrue until some time after the filing of the wife's bill, she declined to produce any evidence in defence of her husband's claim or to prove her own charges, she would be regarded as having filed her bill in bad faith, and hence was not entitled to set up the filing thereof in bar of her husband's right to a divorce because the grounds had not accrued at the time of the filing of her bill.

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On final hearing on petition for divorce, answer, cross-bill, replication and proofs.

*Mr. Thomas L. Raymond*, for the petitioner.

*Messrs. Sommer, Colby & Whiting*, and *Mr. Charles H. Strong* and *Mr. Clinton H. Blake, Jr.* (of the New York bar), for the defendant.

HOWELL, V. C.

The controversy in this case arises out of a suit for divorce. In order to decide the questions raised it will be necessary to examine the course of pleading and practice which was followed. On October 5th, 1908, the wife filed her petition alleging constructive desertion by the husband on June 2d, 1906. This pleading contained a large number of allegations of fact tending to show that the wife was driven from her home by the cruelty and malicious acts of the husband and by threatening language to her and the two children of the marriage. On October 21st, 1908, she filed an amended petition in which she repeats and

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amplifies her accusations against her husband, and insists on a constructive desertion on June 2d, 1906, the day named for the purpose in the original petition. The citation on file was issued October 24th, 1906, and was returned not served, whereupon on November 25th, 1908, the usual order for publication to effect substituted service was made by which the husband was required to answer the petition on or before January 26th, 1909. On January 20th, 1909, he, by one of the solicitors of this court, took an order extending his time to answer for twenty days after the expiration of the time allowed therefor by the order for publication; and on February 13th, 1909, he took another order granting him twenty days additional. On February 24th, 1909, he entered a regular appearance and filed his answer by which he denied all the material allegations of the petition and alleged that the wife had deserted him on March 19th, 1907, setting up this offence in bar of her petition. No replication appears to have been filed to this answer. On May 5th, 1909, the husband filed what is styled an "amended answer and cross-petition," again setting up the wife's desertion of him on March 19th, 1907, and alleging by way of cross-petition that the wife had deserted him on the day last named without his fault and against his protest, and praying that he might be granted a divorce from the wife on that ground. The files do not show that leave of the court was applied for or given to the husband to file this answer and cross-bill, but upon question being made as to its regularity the solicitors for the respective parties on June 7th, 1909, agreed by stipulation on file that the said "amended answer and cross-petition should be deemed to be duly filed as within time and should in all respects be treated as the defendant's answer and cross-petition in the cause." On July 1st, the wife filed her replication, joining issue on the cross-petition and denying the desertion charged by it.

It thus appears that the desertion of which the wife complained had ripened into a complete and suable cause of action at the time of the filing of her original petition; and it will be likewise observed that at that time the desertion of which the husband complains had not ripened into a complete and suable cause of action, but that it matured thereafter and before the

filing of the cross-petition by the husband. In other words, the husband's cause of action had not accrued at the time of the filing of the original petition, but had accrued at the time of the filing of the cross-petition. The cause came on for final hearing in October, 1909. Upon the call of the case counsel for the wife declined to proceed on the petition. The husband's counsel thereupon moved to dismiss the petition, and, at the same time, moved the hearing on the cross-petition. The court directed that the wife's petition be dismissed, and ordered the hearing on the cross-petition and the replication thereto to proceed. The husband adduced his proofs and rested, whereupon counsel for the wife announced that she would make no defence to the cross-suit, giving reasons therefor which are not pertinent to the present inquiry. The defendant's proofs fully sustain the allegations of the cross-petition and entitled him to relief on the facts. Whether or not he may have a decree in his favor on the cross-petition depends upon a solution of these questions of law—*first*, is it competent for a defendant in a divorce proceeding to set up in bar of the suit a matrimonial offence committed by the complaining party which accrued after the filing of the original petition? *Second*, can the defendant in such suit set up the same facts by way of cross-petition and obtain a decree thereon, or may the defendant interject the new fact into the old suit and obtain the same relief which he might have obtained by filing an original petition as of the same date?

There are other questions incidental thereto, as—*first*, whether jurisdiction of the cross-petition may be acquired by this court under the present Divorce act except by personal service of process upon the original petitioner; and *second*, whether the time during which the wife's petition for divorce was pending can be computed as part of the two years' desertion necessary to give validity to the husband's cause of action?

In *Fuller v. Fuller* (1886), 41 N. J. Eq. (14 Stew.) 198, there was an application made for leave to file a supplemental answer for the purpose of setting up a matrimonial offence committed by the petitioner since the filing of his original petition.

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It appeared satisfactorily to the court from the moving papers that the defendant had stated therein a case which the court should investigate, and permission was given to file a supplemental answer setting up the petitioner's adultery since the suit was begun. Vice-Chancellor Van Fleet says: "Adultery committed after a suit is brought is just as effectual as a bar as that which may have been committed before. Indeed, the latter would seem to be more offensive to the purity and decency which the law requires those who seek its help to observe than the former. I have been unable to find any case in which an application like that which the defendant now makes has been denied. In *Brisco v. Brisco*, 2 Add. 259, a wife was allowed to charge her husband with having committed adultery pending the suit nearly seven years after its institution. In *Moors v. Moors*, 129 Mass. 232, it was held where a husband who had obtained a provisional decree entitling him to a divorce in the future, but not dissolving his marriage *eo instante*, and he subsequently, under an honest belief that he had a right to do so, married again, that his having sexual intercourse with the woman whom he supposed he had lawfully married constituted adultery and barred his right to a divorce." See *Smith v. Smith*, 4 Paige 432, and *Burr v. Burr*, 2 Edw. Ch. 449. This case does not appear to have been referred to nor its authority called in question, and I shall assume that it expresses the settled law of this state. Nor, indeed, do I see how it could be held otherwise. If the final decree in a cause fixes the rights of the parties as of its date it would seem to be consonant with the principles of justice that every right and every defence to which either of the parties was entitled at any time before the date of the decree should be considered. And this leads to the second question, whether the defendant may, by his cross-petition, allege facts which would operate as a bar to the original petition if pleaded by way of answer, and base thereon a final decree in favor of the cross-petitioner. Before proceeding with this branch of the case I will pause to remark that the testimony showed that the wife was actually domiciled in New Jersey and that the husband was residing in New York. Objection was made in *Abele v. Abele* (1901), 62 N. J. Eq. (17 Dick.) 644, that a decree could not



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be made on the cross-petition of a non-resident defendant," but it was held that the jurisdiction attached by virtue of the statute which was then in force. The statute now in force (section 6a) confers jurisdiction as broadly as did the act referred to in the *Abele Case*. The current of authority is in favor of the proposition that, even in the absence of an enabling statute, non-residents who are brought into court to answer a complaint may prefer their own complaints and obtain the proper relief thereon. *Clutton v. Clutton*, 108 Mich. 267; *Jenness v. Jenness*, 24 Ind. 355; 87 Am. Dec. 335. Our chancery rule 206a, in so far as it has not been abrogated by the present Divorce act, does not exclude non-resident defendants from its operation, and its terms are certainly broad enough to include them. The reason is that when the defendant is once personally brought into court he is there for all purposes that relate to the cause of action embraced within the scope of the suit.

This rule (206a) has a bearing upon the second question herein above stated and also on the question of jurisdiction. It unifies the practice in divorce cases with that prescribed in cases arising under the general equity jurisdiction of the court. Its terms include all defendants, non-resident as well as resident. It dispenses with the actual service of process and provides a short and simple method of reaching an issue. The defendant under this rule

"may set up in the answer matter which would be a proper subject of a bill of complaint or a petition, and may obtain such relief thereon as he or she would be entitled to upon a separate bill or petition against the complainant or petitioner," &c.

In the case at bar the requirements of this rule seem to have been met. The defendant did set up in his answer matter which would have been a proper subject of a petition, and he seeks to obtain the same relief thereon that he would have been entitled to on the same facts if he had filed an independent petition. He has alleged and proved a desertion by the wife which had ripened into a cause of action at the time of the filing of the cross-petition. Under the authority of *Fuller v. Fuller*, *supra*, these facts are competent as a defence and are admissible in evi-

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dence for the purpose of barring the petitioner's suit even though the right accrued after the filing of the original petition. And with the greater reason may these facts be interposed as a defence and be alleged by way of cross-petition for affirmative relief in a case where the right has accrued and the cause of action has become suable prior to the filing of the amended answer and cross-bill.

Counsel have cited cases from other jurisdictions which illustrate the application of the argument to pertinent facts. In *Martin v. Martin*, 33 W. Va. 695; 11 S. E. Rep. 12, the petitioner sought a divorce on the ground of adultery. The defendant answered and filed a cross-bill praying for a divorce against the petitioner on the ground of desertion, although at the time of the filing of the original bill the statutory period of desertion had not elapsed. It had elapsed, however, before the defendant filed his cross-bill. This is a state of facts precisely similar to those in this case. The court granted a decree on the cross-bill, stating in the opinion that "At the time the original bill was filed by the plaintiff the period of three years had not elapsed since the said plaintiff left the house of the defendant, and when that time did elapse he found it necessary to file his cross-bill in order to then allege willful abandonment and desertion of himself by the defendant for three years as a ground for divorce from the said plaintiff. \* \* \* This cross-bill was filed by said defendant for the purpose of obtaining relief which he could not have obtained by an answer in the original suit because at the time the said suit was brought the circumstances did not exist which would entitle him to relief, and this made the cross-bill necessary in order that this might be alleged and full relief might be granted the plaintiff in said cross-bill touching the matters of the original bill." In *Neddo v. Neddo*, 56 Kan. 507; 44 Pac. 1, the court held in a case where a cross-petition was filed setting up abandonment of the defendant by the plaintiff that the period of abandonment necessary to give the cross-petitioner a right of action did not terminate with the commencement of the original action, but that it extended to the time of the filing of the cross-petition. The obvious reason is that it is absurd that the defendant should be

involved in two suits embracing the same facts and be compelled to prove them, first, as a defence, and secondly, as a ground for affirmative relief; and further, that this court having once rightly obtained jurisdiction over the parties and the subject-matter of the litigation, will proceed to hear the whole case, and measure out justice to the parties once for all on the facts alleged and proved.

If it be objected that the filing of the cross-petition and amended answer rests wholly in the consent of the parties by reason of the stipulation that was entered into, and that no divorce can be granted in this case because of the well-settled rule that no divorce will be granted upon any consent of the parties, it may be said that if application had been made to the court for leave to file these pleadings leave would have been undoubtedly granted as was done in the case of *Fuller v. Fuller*, *supra*, and in the very well-considered case of *Wadsworth v. Wadsworth*, 81 Cal. 182. The stipulation therefore must be treated not as a consent to a divorce decree nor as a consent to confer jurisdiction, but rather an agreement by counsel which merely avoids the necessity of the more formal application to the court.

It is manifest that some portion of the time relied upon by the husband for the accrual of his cause of action was occupied and taken up by the original suit brought by the wife—that is, from October 5th, 1908, the day of the filing of her petition, to March 20th, 1909, the day on which the husband had a right to file an independent petition. It was so held in *Weigel v. Weigel*, 63 N. J. Eq. (18 Dick.) 677; *affirmed*, 65 N. J. Eq. (20 Dick.) 398, and in *Johnson v. Johnson*, 65 N. J. Eq. (20 Dick.) 606. If this rule were applied to this case there would be a considerable reduction from the time during which the husband's cause of action was in process of maturing, and his cross-petition would have been prematurely filed. There are many cases to this effect, most of which are collected by Vice-Chancellor Grey in the *Weigel Case*. There is, however, an exception to this rule which the vice-chancellor comments upon in the *Weigel Case* within which the case at bar clearly comes, and that is that the petitioner cannot insist upon the enforcement of the

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rule in a case in which it appears to the court that his or her original petition was filed and prosecuted in bad faith. In the present case the wife, in the most formal and solemn manner, formulated charges of matrimonial offences against her husband which were sufficient, if true, to have led to his indictment and punishment by the criminal courts. These were repeated and enlarged upon in her amended petition, and again referred to less virulently in the replication to the cross-petition. One would naturally expect that some attempt would have been made to substantiate these charges, but at the hearing she not only abandons her own attack, but declines to produce any evidence by way of defence against the attack of her husband. These facts show that the petition of the wife was filed and prosecuted in bad faith and that she ought not to be allowed to set up her own delinquencies in bar of her husband's right.

Having found the facts in favor of the defendant on his cross-petition, it remains only to state, in conclusion, that there is nothing in the law which stands in the way of granting him the relief prayed for in the cross-petition, and I will advise a decree in his favor.

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THE FEDERAL TRUST COMPANY

v.

ALBERT A. GUIGUES et al.

[Decided November 24th, 1909.]

1. Where a building was commenced before the execution of a mortgage on the property, valid lien claims have priority over the mortgage.

2. Where a hardware materialman's contract required complete delivery for thirty days before payment on an architect's certificates, and the materialman, on visiting the property to make the final delivery, found considerable of the hardware furnished scattered throughout the second story of the building, whereupon he collected such material, refinished part of it, and delivered it with the final installment to the architects,

but did not obtain a certificate from them until after they had been discharged by the owner, there was no sufficient delivery to constitute a compliance with the contract so as to entitle him to a lien.

3. An action will not lie to recover moneys due on a building contract providing for an architect's certificate as a condition precedent, unless the certificate is produced or its production excused by the evidence.

4. A mechanics' lien claimant, having contracted to finish the plumbing, gasfitting and metal work of a dwelling-house for \$2,950, completed the work, except connecting the kitchen range, on September 25th, 1907. The owner did not furnish the range until March, 1908, whereupon claimants, on March 25th, connected it by the services of two men for four hours, their lien claim being filed June 25th, 1908.—*Held*, that the work done on March 25th was not trivial, but a substantial portion of the contract required to complete the same, and was therefore sufficient to start anew the time within which claimant was required to file his claim.

5. The testing of the plumbing, gas, and metal work in a building to ascertain whether it was properly done was a part of the contract for which no charge could be made for extra work.

6. Where a member of a firm of architects employed to supervise the construction of a building visited the premises at a time when no work was being done, and had not been done for two or three months, the visit was insufficient to keep the architect's lien for services alive.

7. Where an architect visited the premises on which a building he was supervising was being erected to take care of the place, and see that things were safe and to serve notice on the contractors to finish their work, if anyone was working, such acts were within his duties as architect, and were sufficient to start a new period for filing the lien.

8. Where the carpenter contractor for the construction of a building always stood ready to finish the work, but was not permitted to do so, both because of a difficulty between the owner and the architects and their subsequent discharge, and the fact that the contractor could not work under the detailed drawings submitted, and also because of the owner's financial embarrassment, the contractor's failure to complete the work and to furnish an architect's certificate, as required by the contract, was no objection of his right to a lien.

9. Where property covered by a mortgage consisted of a dock lot used by the owner as a landing place for his yacht and separated from the mansion-house, also mortgaged, by a public highway, the house lot being bounded on three sides by a street, lien claims for labor and materials furnished in the construction of the house would be regarded as liens on the house and lot only as against the mortgage.

10. The Mechanics' Lien law (*P. L. 1898 p. 548 § 21*), declaring that when the curtilage of a lot on which a building is erected shall not be surrounded by an enclosure separating it from adjoining lands of the same owner, then the lot on which the building shall extend shall be such tract as in the place of its location is designated as a building lot, &c., but in no case to exceed one-half acre, had no application to lien claims for work and materials on a mansion-house located on a lot bounded on three sides by public streets and on the other by the property

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of an adjoining owner and separated from a water lot, which the owner used as a landing place for his yacht, by a public street.

11. Where several mechanics' lien claims for labor and material performed in the construction of a building were all of one character, and there was nothing in the circumstances which would authorize priority of one over the other, they were all of equal rank.

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On final hearing on bill, answer, replication and proofs.

*Mr. John R. Hardin*, for the complainant.

*Mr. Charles C. Hommann*, for Kelly & McAlinden Company,

*Mr. Albert C. Pedrick*, for the Cort Hardware Company.

*Mr. Michael Tansey* and *Mr. Joseph A. Connolly*, for Pigott & Mathesius.

*Mr. James S. Wight*, for Ira R. Crouse.

HOWELL, V. C.

This suit is brought to foreclose a mortgage made by the defendants Albert A. Guigues and wife to secure the payment of the sum of \$10,000 and interest. The mortgage is dated May 27th, 1907, and was duly lodged for record in the clerk's office of the county of Middlesex on May 28th, 1907. It covers two tracts of land in Perth Amboy. The first is bounded by Rector, Lewis and Water streets, and lands of one Runyon; the second is a dock lot lying easterly of the first lot and separated from it by a narrow public highway called Water street. At the time of the making of the mortgage there was in course of construction on the first tract a dwelling-house of large proportions, the contract price of which was upwards of \$33,000, and towards the erection of which four of the defendants claim to have performed labor and furnished materials. The debts claimed by them respectively therefor not having been paid, they filed lien claims under the provisions of the Mechanics' Lien law against both tracts, and in consequence were made parties defendant to this suit.

The building was commenced before the execution of the mortgage and the situation is therefore such as that if the lien claims are valid under the provisions of the lien law they have priority over the complainant's mortgage.

Two questions are raised by the complainant against each of the lien claims. The first one concerns the validity of the claims under the lien law, and the second touches the size of the curtilage. I will take up the claims *seriatim*.

#### CORT HARDWARE COMPANY CLAIM.

This claim arises out of an agreement dated September 29th, 1906, between the Cort Hardware Company and the defendant Guigues, and provides for furnishing all the hardware for the dwelling-house in question. It provided in article IX. that the sum to be paid by the owner for the said materials was \$442, to be paid to the contractor in current funds only upon certificates of the architects, but in one payment when all was furnished complete and within thirty days after the delivery. It appears that up to November 19th, 1907, the Cort Hardware Company had furnished considerable of the hardware provided for by this contract, and that the hardware had been put in place throughout the second story, and possibly some other portions of the building, and that there remained in the building a considerable portion which had not yet been attached. On that date the president of the company went with one of the architects to the building for the purpose of delivering the final installment of the hardware. This final installment he carried with him. When they arrived at the building they found the hardware which had not been attached to the building scattered about, and the architect, in the presence of the president of the claimant, had the hardware packed into a barrel and shipped to the claimant at Newark. The claimant's president did not deliver the final installment, but carried it back to Newark with him; and the claimant then took into its possession all the hardware which had been shipped from the Perth Amboy house, checked it up and repolished some of it, and then delivered the same to the architect,

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in whose possession the same now appears to be. I do not see how this series of facts can be construed into a delivery under the contract above mentioned. There was no final delivery, and there was no proper certificate by the architects named in the original contract, as the arbiters on the claimant's work. It appeared in the testimony that a controversy arose between the owner and his architects which resulted in their discharge by him in the month of September, 1907. The Cort Hardware Company did procure from these architects a certificate that they had furnished labor and material in pursuance of their contract amounting to \$465.53. This I understand to be the full amount of their claim, but it was procured on February 11th, 1908, long after Pigott & Mathesius had been discharged by the owner, and therefore as a certificate under the contract could have no force or effect. It is well settled that an action will not lie for moneys due upon a building contract which provides for an architect's certificate unless the certificate is produced or its production excused by the evidence. In *Byrne v. Sisters of St. Elizabeth* (1883), 45 N. J. Law (16 Vr.) 213, Mr. Justice Knapp, in the supreme court, declared the rule for that tribunal. The statement made by him in his opinion touching the competency of a court of equity to grant relief relates only to some supposed fraudulent action of an architect in withholding the certificate. This court cannot give any relief of that nature in this case for the reason that the pleadings are not properly framed for the purpose. The right claimed by the lien claimants is a legal right, and it must be dealt with in this court, as in a court of law, upon legal principles. The claim was drawn into this court not by reason of anything in the pleadings or in the jurisdiction of the court over the legality and validity thereof, but because the pleadings required a settlement of the question of priorities, and this question drew along with it the question of validity. Two years later Vice-Chancellor Van Fleet in this court came to the same conclusion in the case of *Kirtland v. Moore* (1885), 40 N. J. Eq. (13 Stew.) 106. This rule was announced recently by the court of errors and appeals in *Sheyer v. Pinkerton Construction Co.*, 59 Atl. Rep. 462.

The result is that this claim must be disallowed



## KELLY &amp; McALINDEN COMPANY CLAIM.

This claim arises out of a contract for plumbing work upon the house in question. The plumbing contract was first taken by a man named Joyce, who failed, and Kelly & McAlinden Company undertook to finish the work. They made a new and special contract with the owner on January 28th, 1907, which provided that they should furnish all the work for the completion of the plumbing, gasfitting and metal work required for the house for \$2,950. Their payments were to be made as the work progressed, monthly, to the amount of eighty per cent. of the value of labor and materials furnished. The remaining twenty per cent. was to constitute the final payment.

The first objection to this claim is that the lien had expired before the claim was filed. The lien claim was filed June 29th, 1908. Kelly & McAlinden swear that the last work that was done by them on the contract was done March 25th, 1908. That turned out to be four hours' work by two men who were engaged in connecting up the kitchen range. They had done no work on the building previously to this time since September 25th, 1907. The reason why they were delayed in finishing their work was that the owner did not furnish the range until March of 1908; hence the claimants could not put it in place and connect it up. In my opinion the work that they did on March 25th, 1908, was not trivial, but was a substantial portion of the contract, and was required in order to finish it up. I therefore conclude that the lien claim was filed in time.

During the progress of the work the architects furnished to the Kelly & McAlinden Company two certificates, the first one for \$1,293.87, and the second one for \$1,018.13, making altogether \$2,312, on account of which they were paid \$1,000, leaving due to them \$1,312 on account of the contract. Their lien claim includes \$202.36 for extra work, a portion of which should be disallowed. The items charged under date of March 14th were for testing the work which had been done by Joyce, and should be disallowed, because it is part of the contract to see that the work is properly done, and although there was some evidence

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that the architects had given an order for it the fact turned out to be that the testing was done before the order was given. These two items, amounting to \$7.30, will therefore be disallowed. The item charged under date of March 25th, \$33.60, appears to have been ordered by the architect as agent for the owner, and should be allowed. The item of March 13th to 30th, amounting to \$106, appears to me to be a part of the original contract, and should be disallowed; and the same is true of the charges under date of March 28th to April 3d, amounting to \$18. They are part of the original contract. Concerning the remaining items there is very little satisfactory evidence outside of the general statement that they were ordered by the architect.

My conclusion as to this claim is that it should be allowed for \$1,312, and in addition thereto the items for extra work, excepting those which are disallowed.

#### PIGOTT & MATHESIUS CLAIM.

The claimants in this case are the architects of the building. Their claim was filed January 31st, 1908. The principal objection to this claim is that the lien had expired before the lien claim was filed. Mr. Pigott, one of the firm, visited the premises on November 19th, 1907, in company with Mr. Birkenmeier, president of the Cort Hardware Company, but inasmuch as no work was being done at that time, and apparently there had been no work done on the building for some two or three months previous, it can hardly be claimed that that visit was sufficient to keep the lien alive. The visits made by Mr. Pigott to the building before that time were made in October. His account of railroad expenses shows that he was at the building October 17th and 24th. Previous to that Mr. Pigott was at the building on September 3d and 27th; at that time the plumber was working, the stucco man was fixing up defects in his work, and another man was engaged in putting on weather strips; but when he went there in October the building was practically at a standstill. He says, however, he had to go down there to see that things were safe, to take care of the place, to see if anyone was

working, to serve notice on the contractors to finish their work. These were all within the scope of his duties as architect, and I think are sufficient to give vitality to the lien. The owner, Mr. Guigues, became dissatisfied with the work of Pigott & Mathesius, and some time in the month of December, 1907, he discharged them from his employment on this work. It is difficult from the testimony to determine who was at fault in this matter. The burden of proof is on Mr. Guigues. The evidence which he has adduced does not satisfy me that the architects did not comply with their contract.

Their claim will therefore be allowed for the sum of \$1,229.41.

#### IRA R. CROUSE CLAIM.

The lien claim in this case was filed on June 23d, 1908, and the testimony of the claimant is that the last work that he did on the house was about May 12th of that year. This claim arises out of a contract made on May 22d, 1906, between Ira R. Crouse and Albert A. Guigues, by which Crouse agreed to perform all the carpenter, mason and excavation work for the Guigues residence as shown on the specifications, for the sum of \$16,526. The payments were to be made monthly to the extent of eighty per cent. of the value of the work performed up to the date of the architects' certificate, and the twenty per cent. held back was to constitute the final payment.

Mr. Crouse was never permitted to finish his contract, although he always stood ready to do so. The difficulty arose out of a controversy between the owner and the architects and their subsequent discharge from the owner's employ, and also from the fact that the claimant, Mr. Crouse, could not work from the detailed drawings, his reason being that the trim and wainscoting which was specified for the first floor of the house did not correspond with the requirements of the specifications prepared by the architects. There was another reason which arose out of the financial embarrassment of the owner. Mr. Crouse's work appears to have proceeded properly up to the time when the difficulties above mentioned became acute. He holds an archi-

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6 Buch.Federal Trust Co. v. Guigues.

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tect's certificate for \$800, dated April 27th, 1907, which has never been paid, and it appears that he never received any money from the owner after the date of that certificate. He worked on the building as long as it was possible for him to do so. The strained relations between the owner and the architects and their final discharge appears to have put it out of the power of Mr. Crouse to proceed any further. A Mr. Enstice was employed by the owner to superintend the construction of the building after the architects had been discharged, and as such he was an agent representing the owner, but he found it impossible to give proper instructions to Mr. Crouse, and Mr. Crouse was therefore obliged to stop work. This state of facts excuses Mr. Crouse from the production of any architect's certificate. In fact, there were no architects who could give him a certificate; certainly the architects agreed upon could not, and his claim will therefore be allowed as stated in the lien claim filed by him in the Middlesex county clerk's office. The amount stated by him in his testimony is \$9,297.14.

All these claims will bear interest, and if counsel cannot agree upon the amount I will undertake to settle it.

#### CURTILAGE.

The property covered by the complainant's mortgage includes not only the tract of land bounded by Water, Lewis and Rector streets, on which the mansion-house is situated, but includes also a dock lot abutting upon Raritan bay, but separated from the plot on which the mansion-house stands by a narrow street or driftway, which appears to be also a public highway. There is a controversy between the mortgagee and the lien claimants as to the size of the curtilage upon which the lien claims which have been allowed are to stand. It is quite apparent that the statute (*Mechanics' Lien law* § 21) does not apply to the case, and that we must have recourse to the decisions which have been made on the subject in our state. In *Derrickson v. Edwards*, 29 N. J. Law (5 Dutch.) 468, it was held that the curtilage intended by

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Lehigh Valley R. R. Co. v. N. Y. & N. J. Water Co.

76 Eq.

the act to be subjected to the lien should be so much land as might be necessary for the convenient and beneficial enjoyment of the building on which the claimant's work was done. There seems to be no natural and necessary connection between the lot of land on which the mansion-house is erected and the dock lot separated from it by Water street. It appears that the owner used the dock lot as a landing place for his yacht, but it had no necessary connection with the use of his dwelling-house. The mansion-house lot is surrounded on three sides by streets, and is bounded on the north by lands of an adjoining proprietor. There are on it the dwelling-house and a building used as a garage and coachman's quarters. This plot seems to be complete in itself and not to require the dock lot as a necessary adjunct for its enjoyment. The lien claims therefore will be held to be liens only on the mansion-house lot.

It need hardly be said that the lien claims are concurrent liens upon the premises to which they have been confined. They are all of one character and there is nothing in any of the circumstances which could operate to give one priority over the other. See *Mechanics' Lien law* § 20.

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LEHIGH VALLEY RAILROAD COMPANY et al.

v.

NEW YORK AND NEW JERSEY WATER COMPANY.

[Decided December 2d, 1909.]

1. Where a water company, without authority, laid its pipes on the towpath of a canal company, ousting the canal company from possession thereof, there was an ample remedy at law in trespass or ejectment, and a mandatory injunction which alone would give adequate equitable relief would not be granted; such injunction rarely issuing as a provisional remedy, and not being permitted to usurp the legal remedy of ejectment.

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6 Buch.      Lehigh Valley R. R. Co. v. N. Y. & N. J. Water Co.

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2. While equity will protect an easement by injunction, it must clearly appear that there is an easement, and its character and extent must be plain, and a preliminary injunction will not be granted to protect an alleged easement of a canal company in adjacent land upon which earth from the canal had been deposited from the laying of a water company's pipes therein, where the extent of the canal company's easement, whether to the width of the actual bank or to the width of a strip of land upon which the earth was deposited at the time the canal was built, does not appear, and the character of the water company's rights therein are not shown.

3. It appearing that the canal company had not for several years used the canal for purposes of transportation, it simply being an open, unused ditch, with a towpath on one side over which the public had a right to pass, but did not pass, the laying of the water pipes in the spoil bank on the adjacent land, or on the towpath at overhead crossings, was not shown to have caused irreparable damage justifying injunctive relief.

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On motion for preliminary injunction.

*Mr. George Holmes*, for the complainants.

*Mr. Robert H. McCarter*, for the defendant.

HOWELL, V. C.

This suit concerns the rights of the parties hereto in the spoil bank and towpath of a portion of the Morris canal which lies east of the Hackensack river and the Newark bay. When the Morris canal was extended from the Passaic river to the Hudson river, after crossing the Hackensack river, the line runs in a northerly and southerly direction easterly of and in some places quite near to the easterly bank of the Hackensack river and the easterly shore of Newark bay; and the contest is over the rights of the parties from the point where the canal leaves the Hackensack river down to a point in the city of Bayonne. Throughout this distance, the canal company, at the time of its construction, did not take condemnation proceedings to obtain the land necessary for the construction of its canal, but made an agreement with the property owners, which is dated August 15th, 1834, the fourth paragraph only of which is important to this litigation. It reads as follows:

*"Fourth.* The Morris Canal and Banking Company shall have the right to deposit any surplus earth or stone or other matter produced by the excavation and construction of the canal upon the adjacent lands, occupying no more of the adjacent lands than may be reasonably necessary for that purpose, and the said Morris Canal and Banking Company shall pay or tender to the said several owners at such rate per acre for the lands thus used as shall be fixed in and by the award of the aforesaid arbitrators, the said company having the right to the occupancy of the adjacent lands for the aforesaid purposes of depositing thereon the surplus earth but the title thereto to remain in the landholders, and it is further agreed that the said company do give to the said landholders respectively on the making of this award, satisfactory personal security to be determined on in case of disagreement by the parties, by the aforesaid arbitrators, that they will make payment to the landholders, severally for the lands so occupied within five days after the completion of the canal through or across the land of each owner or proprietor adjacent to the lands so occupied as aforesaid and the earth and materials so placed on the adjacent lands are to remain as placed by the company, and are not to be removed or disturbed by the landholders, and the said company shall have the right to preserve and maintain the same."

The canal company, after satisfying the property owners in the manner and to the extent provided for in that agreement, proceeded to construct its canal, and instead of removing the earth taken from the excavation, deposited the same upon the lands of the abutting owners under the terms of the said fourth paragraph of the agreement. The towpath was constructed along the west bank of the canal, and the earth which came from the excavation was deposited upon the lands of the property owners west of the towpath. The bank, or pile of earth west of the towpath, is called the spoil bank. The canal company claims the right of actual possession of the canal and the towpath, and also an easement in so much of the land of the adjoining proprietors as is necessary to maintain and support the canal constructions, and that the canal company is now not only entitled to such an easement, but is in actual possession thereof. The land on either side of the canal property between the points mentioned is low, flat, marshy meadow land.

On September 9th, 1896, an agreement was entered into between the canal company and the Lehigh Valley Railroad Company, its lessee, parties of the first part, and the defendant, party of the second part, by which the complainants gave to the defendant the right, so far as they had the right to do so, to lay

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6 Buch.      Lehigh Valley R. R. Co. v. N. Y. & N. J. Water Co.

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and maintain a steel water pipe, not exceeding thirty inches in diameter, under and along the said spoil bank and towpath of the canal between the points herein above mentioned, below the surface, with the right to enter upon the spoil bank and towpath from time to time for the purpose of laying, maintaining, repairing, changing and removing said pipe as might be necessary, subject to the approval of the complainants, the defendant paying to the complainants the sum of fifty cents per running foot of pipe laid under the land actually used as a towpath by the canal company. Recently, the defendant, without the consent of the complainants, began the construction of another pipe line west of and near to the first line, and, as defendant claims, wholly under the said spoil bank, and not disturbing or impinging upon the towpath except in two places. One of these is at the overhead crossing of the Central Railroad Company, and the other at the overhead crossing of the Hudson county boulevard, in Bayonne. At these points, the abutments, which support respectively the railway line and the boulevard, are constructed immediately at the westerly edge of the towpath, and at these two points the defendant is now engaged in laying its new pipe line on the top of the towpath and next to the abutments, thus taking from the canal company a considerable portion of the towpath at these points. There remains, however, a clear width of towpath at these two places of about eight feet.

The defendant alleges that it has procured and has in its possession instruments in writing executed by all the abutting landowners consenting to the laying of these pipe lines; that these consents are efficacious for the reason that the abutting owners hold the legal title to the abutting lands up to the westerly line of the towpath. The complainants, on the other hand, claim that they have an easement in so much of the land which is called the spoil bank beyond and outside the towpath as is necessary to protect the canal and the towpath; that they are in the actual possession of it; that the attempt of the defendant to lay its second pipe line without the consent of the complainants is a disturbance of their easement and that it amounts to a continuing trespass, and that therefore the situation is within the injunctive jurisdiction of this court. They pray that



the defendant may be enjoined from further proceeding with the construction of its second line, not only in the spoil bank, but also on the top of the towpath at the points where the Central railway and the Hudson county boulevard respectively cross the canal. The defendant has answered and has submitted answering affidavits by which it appears that it has been permitted by the complainants to lay over seven miles of the second pipe line without obstruction, and that they assisted the defendant therein by giving it the use of their canal boats to carry the pipe to this section of the canal and to distribute it along the same; that having acquired from the owners of the abutting lands their consent to the laying of the second line, it has a right to proceed with its construction against the wish and without the consent of the complainants, it, however, taking all precautions necessary to prevent any injury to the property of the canal company. It says further that the portion of the canal along which this second line is being laid is not now and has not for years past been used or operated as a canal, and that such use and operation have been abandoned by the complainants; that this section of the canal has been permitted to fall into disrepair, and that therefore no injury can come to the complainants by reason of its occupancy of the spoil bank and the two short sections of the towpath above mentioned, and it demurs to the bill upon the ground that this court has no jurisdiction, that the rights of the parties have never been settled at law, and that the complainants have an ample remedy according to the course of the common law.

It is quite apparent that at the two points where the defendant has actually occupied a portion of the towpath the action of the defendant amounts to a seizure and occupation of lands to which complainants have the exclusive right of possession. At these points there is no supervening equity which give this court jurisdiction. It is not a continuing trespass in the sense in which that term is used in giving jurisdiction to a court of equity, but according to the complainants' own statement it is a forcible and high-handed seizure and occupation of the complainants' lands. If the controversy were between two individuals nobody could contend that a court of equity could have

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6 Buch.      Lehigh Valley R. R. Co. v. N. Y. & N. J. Water Co.

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the right to intervene. The complainants by their own statement have actually been ousted of their possession with a strong hand and their claims of right set at defiance. For such action as this the common-law courts afford complete and ample remedies by an action for trespass or in ejectment. To issue an injunction now to prevent the laying of the pipes at these points would do the complainants no good. The pipes are already laid, and nothing short of a mandatory injunction would give them the relief which they claim they are entitled to. A mandatory injunction rarely issues as a provisional remedy, and I know of no case in which a mandatory injunction has been permitted to usurp the plain and simple legal remedy by an action of ejectment.

•As to the portion of the premises which are denominated the spoil bank there is nothing in the case to indicate the character or extent of the right of either the complainants or the defendant therein. The width of the spoil bank is not defined, nor is it described with any such particularity as would be necessary for the process of injunction if they were entitled to such process. They claim that the last clause of the fourth paragraph of the agreement of 1834,

“the earth and materials so placed on the adjacent lands are to remain as placed by the company and are not to be removed or disturbed by the landholders, and the said company shall have the right to preserve and maintain the same,”

gives them an easement in the abutting land, but whether it is to the width of the actual bank, if there is a bank there, or to the width of the strip of land upon which they deposited the earth from the canal excavation at the time the canal was built, does not appear. The whole controversy is one that, in my opinion, should be first submitted to the common-law courts. The authority will be found in the case of *Delaware, Lackawanna and Western Railroad Co. v. Breckenridge*, 55 N. J. Eq. (10 Dick.) 141; affirmed, 55 N. J. Eq. (10 Dick.) 593, and the cases there cited.

Chief-Justice Beasley said in *Ballantine v. Harrison*, 37 N. J. Eq. (10 Stew.) 561, that no case could be found in our reports

purporting to hold that the mere taking possession of lands and holding them *vi et armis* would form the basis for the arrest of the doing of such wrong by the arm of equity. While the court of chancery will protect an easement from violation by its writ of injunction, it is hardly necessary to say that the prime requisite is that it must clearly appear that there is an easement, and the character and extent of it must be plain. Mr. Justice Depue, in *Hagerty v. Lee*, 45 N. J. Eq. (18 Stew.) 255, speaking for the court of errors and appeals, says that it is impossible to emphasize too strongly the rule so often enforced in that court that a preliminary injunction will not be allowed where either the complainant's right which he seeks to have protected *in limine* by an interlocutory injunction is in doubt, or where the injury which may result from the invasion of that right is not irreparable. The facts do not show that the complainants are suffering or will suffer irreparable damage from the act of the defendant. While it cannot be said that the complainants have abandoned the canal in the sense in which the word "abandonment" would be used in a proceeding by the state to forfeit the charter, yet it does appear that the complainants are not using the canal and have not for several years past used it for the purposes of transportation. It is simply an open, unused ditch with a towpath on one side over which the public have a right to pass but over which nobody does pass. In this situation of disuse I fail to see how the laying of the second line of water pipe in the spoil bank can be deemed such a damage as to be beyond reparation, or, indeed, how the occupation by the defendant of the portion of the towpath at the two overhead crossings can be considered to be a damage that is irreparable. On either hand and in either situation I think that the complainants are not entitled to an injunction.

I will advise an order in accordance with these views.

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6 Buch.Schoenfeld v. Winter.

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ABRAHAM L. SCHOENFELD, &amp;c.,

v.

MICHAEL WINTER.

[Decided December 14th, 1909.]

1. Where the jurisdiction of courts of law and equity for the redress of frauds is concurrent, equity should entertain the cause and determine it on its merits, provided adequate relief cannot be obtained at law.

2. A bill to rescind a contract relating to the sale of personal property under a lease, alleging that the contract was induced by representations which were false and which the defendant knew were false, though stating facts sufficient to support a common-law action for deceit, is cognizable in a court of equity.

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On demurrer to the bill of complaint.

*Mr. William H. Osborne*, for the complainant.

*Mr. William A. Lord*, for the defendant.

HOWELL, V. C.

The bill in this case is filed to procure a decree rescinding a contract alleged to have been made between the defendant, Winter, and two persons as partners, one of whom is dead, the complainant being the survivor. The contract related to the purchase and sale of personal property and a lease. At the time of the filing of the bill, a motion was made for a preliminary injunction to restrain an action at law arising out of the contract relation. This motion was denied upon the ground that the supreme court had practically decided that the action was properly brought. A demurrer is now interposed to the bill upon the ground principally that the cause of action set out therein is one which is cognizable in the courts of common law.

The bill sets out a cause of action which would undoubtedly be triable in the common law courts in an action for deceit. It

alleges that the contract was induced by representations which were false, and which the defendant knew were false at the time the contract was made. These allegations are admitted by the demurrer, and while the bill sets out a common law action for deceit, this does not interfere with the jurisdiction of equity. In order to set aside a contract founded in fraud, it is only necessary in equity to prove that the representation upon which the action is founded is false, that it is material, and that damage has ensued; while at the common law the proof must go to the extent of satisfying the jury that the defendant knew that the statement relied upon was false. It will therefore be seen at a glance that the remedy in equity is much broader and much more efficient than the remedy at law could be. It was held in *Morse v. Nicholson*, 55 N. J. Eq. (10 Dick.) 705, that in a case where the jurisdiction of the courts of law and equity for the redress of frauds was concurrent, the court of equity should entertain the cause and determine it upon its merits, provided that adequate relief could not be obtained at law; and this, I take it, is a general rule which ought to be applied in the discretion of the court to cases of fraud where there are concurrent remedies. It was so held in *Eggers v. Anderson* (Court of Errors and Appeals), 63 N. J. Eq. (18 Dick.) 264. There Mr. Justice Dixon recites the English cases and declares that our state has given her adherence to the doctrines of the English courts. See, also, *DuBois v. Nugent*, 69 N. J. Eq. (3 Robb.) 145.

There is, however, a limitation upon this doctrine which is found in the case of *Krueger v. Armitage*, 58 N. J. Eq. (13 Dick.) 357, and in *Polhemus v. Holland Trust Co.*, 59 N. J. Eq. (14 Dick.) 93; affirmed, 61 N. J. Eq. (16 Dick.) 654. In *Krueger v. Armitage* the complainant filed his bill to recover damages accruing out of what was claimed to be a fraudulent sale of stock. There does not appear to have been any prayer for the rescission of the contract, which possibly differentiates the case from the one in hand. The report shows that it was merely a bill for damages based upon a false representation of fact, there being no equitable remedy appealed to except the recovery of damages. Vice-Chancellor Emery held that in that

case the jurisdiction should not be exercised because it had been challenged *in limine*, and that the assessment of damages could be made by a jury as well as by this court. In *Polhemus v. Holland Trust Co.*, a transferee of bonds, issued by a foreign corporation, attempted to recover in equity the amount paid by him for the transfer upon the sole ground that the sale was fraudulent, and therefore the complainant had the right to rescind the transaction and recover back his money; and Vice-Chancellor Reed held that the recovery of money paid by the inducement of false representations was not within the scope of modern equity jurisdiction. These cases were approved by the court of errors and appeals in *Polhemus v. Holland Trust Co.*, 61 N. J. Eq. (16 Dick.) 654.

In these two cases it will be observed that there was no ground of equity jurisdiction except the false representation of fact. But in the case in hand the complainant appeals to the court to declare that the contract induced by fraudulent representations should be rescinded and canceled, and this upon the ground that the contract being void by reason of fraud, the complainant should not continue to rest under the obligation of any portion of it, but that he should be discharged from its performance in whole and in part. This is an equity to which the complainant is entitled if at the final hearing he is able to substantiate his allegations.

I do not now pass upon the question of the manner in which the damages shall be ascertained and measured in case the complainant shall succeed in establishing his right. This may be very properly left to the final hearing, and it may there turn out that damages, if any, are of very easy ascertainment. An examination of the bill discloses that there is no specific prayer for the cancellation of the chattel mortgage which was given by the complainant and his partner to the defendant. If the mortgage covers property which is by the bill tendered to the defendant on the rescission, it probably can make little or no difference whether the mortgage is specifically canceled or not, unless it contains some obligation which the complainant in case of his success would desire to be relieved from.

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N. Y. & N. J. Water Co. v. North Arlington.

76 Eq.

My judgment therefore is that the demurrer be overruled, and that the defendant file his answer to the complainant's bill in twenty days after the service upon him of a copy of the order overruling the demurrer, and if he fails to do so, the bill should be taken as confessed.

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## NEW YORK AND NEW JERSEY WATER COMPANY

v.

## NORTH ARLINGTON BOROUGH.

[Decided December 15th. 1909.]

1. A borough ordinance providing that any person desiring to dig up or open the public streets shall apply to the mayor in writing describing the place for which permit is desired, and the object of opening the street, and that the mayor shall have power to grant the permit whenever in his judgment it may seem proper, is valid under Borough law (*P. L. 1897 p. 285 § 28*) giving boroughs the power to prescribe the manner in which corporations or individuals shall exercise any privilege granted to them in the use of any street, or in digging up the same for any purpose.

2. An application addressed to the mayor and council of a borough for a permit to open streets is not a compliance with an ordinance requiring the application to be made to the mayor.

3. A water company is not entitled to an injunction against interference with its proceeding to open streets for the purpose of laying pipes where it has not applied to the mayor of the borough for a permit as required by a borough ordinance, though the mayor and council to whom the company did apply imposed unreasonable conditions on the granting of the permit.

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On motion for preliminary injunction.

*Mr. Gilbert Collins*, for the motion.

*Mr. John M. Bell* and *Mr. Warren Dixon*, *contra*.

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6 *Buch.*N. Y. & N. J. Water Co. v. North Arlington.

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HOWELL, V. C.

The complainant, a water company, owns the right of way for a pipe line which it is constructing to augment the water-supply of the city of Bayonne, which runs from the Passaic river in an easterly and westerly direction across the borough of North Arlington. It crosses three streets, River road, Kearny avenue and Schuyler avenue. The company is now engaged in constructing a pipe line in this right of way, and in order to finish its work it is necessary to cross the three streets named. This crossing cannot be effected without digging up and opening the surface of the street to make the trench in which the water pipe shall eventually be laid. The company on November 1st last, for the purpose of obtaining a permit to open those three streets and lay their pipe therein, addressed a communication to the "Mayor and council of the borough of North Arlington," in which it informed the mayor and council that it was engaged in laying a thirty-inch pipe line from Belleville to Kearny, and thence to the city of Bayonne, which would necessarily cross the three streets named, and that it would be necessary for the company to open and excavate across each of the said streets; that it claimed to own the property to the centers of the streets and that it was lawfully entitled to lay its pipes across and under the same, subject only to proper supervision and regulation from the mayor and council as to the method of doing the work in order to avoid accident and any unnecessary interruption of traffic. The communication closes with the following:

"Application is therefore hereby made to your honorable body to issue a permit for the opening of such streets and the laying of the said pipe under and across the same under such proper regulation and provision by your engineer as you may fix. We request that you take action on this matter promptly, and remain,

On November 3d last, this communication was presented to the common council of the borough, and the permission sought was refused except under such hard conditions that the company felt that it could not comply with them. The borough then assumed the attitude of opposing the construction of the pipe



line across the said streets, and thereupon the water company filed its bill of complaint to restrain the borough from interfering with the laying of its water pipe across said highways, the complainant offering to submit to any regulation for the doing of the work which this court might prescribe. The bill alleges that there is no general ordinance on the subject of opening highways in the borough of North Arlington, but it appeared on the argument that there was an ordinance which took effect on July 2d, 1900, and is still in force, by which it was provided that if any person desired to dig up or open the public streets of the borough he should apply to the mayor in writing, describing the place, avenue, street or highway for which permit is desired, and the object of opening the same, and that the mayor should have power to grant the permit for such purpose whenever in his judgment it might seem proper. The ordinance contains other provisions for the protection of the borough and its highways, and provides punishment by fine or imprisonment for such persons as may violate its commands.

This ordinance seems to be within the provisions of the twenty-eighth section of the Borough law (*P. L. 1897 p. 285*). That section gives to boroughs the power

"to prescribe the manner in which corporations or individuals shall exercise any privilege granted to them in the use of any street, road or highway, or in digging up the same for any purpose whatever."

For the purposes of this motion it will be considered to be a valid ordinance, and within that class of ordinances which passed under review in the supreme court in *Cook v. North Bergen*, 72 *N. J. Law* (43 *Vr.*) 119, in which the ordinance in question, passed by the township of North Bergen, resembled in its general features the ordinance now under consideration.

Section 23 of the Borough act provides that the council of the borough shall consist of the mayor and councilmen, so that when the complainant addressed its application for leave to open the street "To the mayor and council of the borough of North Arlington," its communication must be held to have been addressed to the council. This is not a compliance with the ordi-

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6 Buch.N. Y. & N. J. Water Co. v. North Arlington.

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nance, which provides that the application shall be made to the mayor, to whom is confided the power to grant a permit \* \* \* whenever in his judgment it may seem proper. Counsel for the complainant argues, however, that inasmuch as the application was addressed to the mayor and council it was within the terms of the ordinance, for the reason that the addition of the words "and council" was supererogatory, and that it was a proper application because the mayor is *ex-officio* a member of the council, and further because the mayor participated in the reception and refusal of the application, and that inasmuch as the refusal was based upon unreasonable conditions the refusal was a void act, and that the complainant therefore has a right to proceed to open the streets without anybody's permission. I think that the conditions which the mayor and council attempted to impose upon the complainant were unreasonable to the highest degree, and that the only conditions which may be imposed by anybody in granting an application under that ordinance are conditions which are necessary for the proper protection of the borough and its public highways, and these appear to me to have been fully covered by the provisions of the ordinance. I think, however, that the unreasonable nature of the conditions imposed will not relieve the complainant from making its application in accordance with the provisions of the ordinance. The application should be made to the mayor, and his refusal, if he should see fit to refuse, must be put upon grounds which are not unreasonable in their character, but which are necessary for the proper protection of the borough and its highways.

The result is that the injunction must be denied.

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Stout v. Portland Cement Co.

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76 Eq.

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MATTIE STOUT

v.

PORTLAND CEMENT COMPANY.

[Decided December 24th. 1909.]

1. The answer must always support the cross-bill.

2. An upper riparian proprietor unlawfully depriving a lower proprietor of the waters of the stream may not, in the absence of any contract between the parties or equity or obligation, maintain a bill to restrain the lower proprietor from suing at law for past damages to ascertain the extent and character of the upper proprietor's violations and to award damages therefor merely to prevent a multiplicity of actions, and because the lower proprietor made no complaint for two years during which the upper proprietor unlawfully took water from the stream.

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On motion for preliminary injunction.

*Mr. Conover English*, for the motion.

*Mr. William C. Gebhardt*, contra.

HOWELL, V. C.

The complainant is the owner of a mill site on Pohatcong creek, in Warren county. The defendant owns about seven hundred acres of land through which this creek runs; its land adjoins the land of the complainant, it being the upper and the complainant the lower riparian proprietor. The defendant has established a large factory for the manufacture of cement on its property, and in the course of its manufacturing process it takes large quantities of water from the creek.

In the early part of the present year the complainant filed her bill in this court alleging that the defendant had been taking from the creek for its own purposes so much of the water as to sensibly diminish the amount which otherwise would naturally

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flow from its land to that of the complainant, and she prays that the defendant may be enjoined from diverting, pumping, forcing or in any other way conveying the waters of the creek or its tributaries or any part thereof from their natural channel and customary course. On filing this bill a motion was made for a preliminary injunction. This was heard before Vice-Chancellor Walker, who denied the motion upon the ground that the complainant had knowingly suffered the injury complained of to continue for two years and upwards without applying for relief, and further, that in a case where the relief would, if granted, effect the stoppage of the defendant's business, the delay was fatal to the application for a preliminary injunction. There was likewise the objection that the complainant's right had not been established at law.

The defendant answered this bill and therein claimed that it had the right to use some of the water of the creek; that such use was essential to the operation of its plant; that the complainant had been cognizant from the beginning of the defendant's operations there; that it was the defendant's intention to continue to use the water; that it had had the actual and continued use of it since January, 1903, and that in the meantime the complainant had taken no legal proceedings to enjoin it from so doing. There is likewise a denial that the taking of the water from the creek interfered with or diminished the power afforded by the stream for the complainant's mill, and a further allegation that the complainant has not been damaged by reason of anything that the defendant has done.

The complainant then brought an action in tort against the defendant in the Warren county circuit court, in which it declared that the defendant for the six years preceding the beginning of the action wrongfully and unlawfully diverted and turned unnecessary and unreasonable quantities of water from the creek away from the complainant's mill and stopped the water of the creek from running and flowing along its usual course to the complainant's mill and from supplying the same with water for the necessary operation thereof, and that by reason thereof the water of the said creek did not run or flow to the complainant's mill as the same of right ought to have done

and otherwise would have done, and alleging damages amounting to \$20,000.

The defendant, by leave of the court, now files a supplemental answer by way of cross-bill against the complainant in which the foregoing facts are alleged and by which it prays that the complainant may be enjoined from further proceeding with her said action at law, and that it may be determined and decreed, in case the complainant is entitled to a writ of injunction as prayed for in her said bill, what amount of compensation, if any, should be awarded to the complainant as just and equitable in lieu of the issuance of the writ of injunction prayed for in the complainant's bill.

It will be observed, therefore, that there are now two suits pending, one in this court and one in the Warren county circuit court. The suit in this court is for an injunction to prevent the defendant from future disturbance of the complainant's right. The common-law action is an action for damages for past infractions of the same right. What the defendant is now seeking to do is—*first*, to stay the suit for past damages; *second*, to have it determined by this court whether the defendant is now or has been in the past guilty of a violation of any right of the complainant to flowage of water, and *third*, if the court finds that there is such an infraction of the complainant's right that it will ascertain the extent and character thereof and award to the complainant such damages as she may be entitled to, which damages the defendant stands ready to pay. As a question of pleading it may be said that the answer must always support the cross-bill. There is a variance between them in this case which must count strongly against the defendant. The answer denies all the injury complained of, while the theory of the cross-bill is that the defendant is committing a continuous trespass on the rights of the complainant, and that it desires to continue the same trespass indefinitely and to pay therefor such sum as this court may assess. If the defendant is guilty of the charge laid to its door it is depriving the complainant of a valuable right in the waters of the creek, and this right is property to which the complainant is entitled. Shortly, then, the case under the cross-bill takes upon itself the aspect of an attempt to

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take private property for private uses upon such compensation being made as the court may award. This, of course, is not to be thought of. There is no proceeding known to the law by which one man can take the property of another for the private use of the taker, no matter what rate of compensation may be offered. This would be an interference with vested rights and cannot be permitted. It will be observed that there is no contract between these parties upon which the cross-bill in this case can be predicated, nor is there any equity alleged by which the bill can be supported, excepting that the jurisdiction invoked may be exercised to prevent a multiplicity of suits. I do not understand that the doctrine touching the power of this court to interfere with a multiplicity of suits extends to the case made by the cross-bill. In short, what the defendant says is this:

"I am committing a most flagrant disturbance of the right of the complainant for which she is suing me. I desire to continue my trespass and to enjoin her suits for damages, not because I have any right in her land, but because she is bringing actions to defend the title to her property which I want and am willing to pay for."

The fact that the complainant lay still and made no complaint for a period of two years, during which time the defendant took water from the stream, may have been sufficient laches to have justified the court in denying to her the provisional relief which she sought, but is she to be deprived of the title to her estate because she did not bring suit immediately upon the beginning of the trespass?

A case similar to this is *Stevenson v. Morgan*, 64 N. J. Eq. (19 Dick.) 219. There the complainant brought suit in this court to restrain the defendant from raising his dam and flowing the complainant's land; he also asked for an assessment of unliquidated damages for injuries caused by past overflows. Vice-Chancellor Grey, who heard the case, held that the equitable relief by injunction against future overflows and the right to recover damages for past overflows were not parts of the same cause of action and that each might be prosecuted separately from the other. A very common instance of a procedure of this sort arises in actions for nuisance, where it is quite the cus-

tomary thing to bring a common-law action for past damages and at the same time exhibit a bill for an injunction to prevent future injuries.

It was said on the argument on behalf of the defendant that the very thing sought to be done by it in the case at bar had time and again been done in this court and been sanctioned by the court of errors and appeals, and a number of cases was cited in support of the statement. Among the others is *Sparks Manufacturing Co. v. Town of Newton*, 57 N. J. Eq. (12 Dick.) 367. That was a case in which the complainant sought to restrain the town of Newton from diverting water from the stream which supplied their mill to furnish a municipality with potable water. The court found on the facts and the law in favor of the complainant and proceeded to assess the complainant's damages by reason of the diversion; this course was taken because both parties joined in requesting it. Vice-Chancellor Pitney said (p. 392) that inasmuch as both parties had submitted themselves to the jurisdiction of the court, and requested that he should determine the amount of compensation, he felt constrained by the state of the authorities to assume that jurisdiction. This view was coincided in on appeal in *Ingersoll v. Newton*, 60 N. J. Eq. (15 Dick.) 400.

A perusal of this case will disclose the fact that the main ground for jurisdiction to assess damages was the fact that both parties had submitted themselves to the jurisdiction of the court on that question.

The Passaic river pollution cases are also cited as an example of what the court may do in the same direction; but these cases stand not upon the power of the court to take a man's property and devote it to private uses by other people upon compensation, but rather upon the equitable consideration of convenience. There the court found that the city of Paterson was guilty of polluting the river, but denied an injunction to stop it on the ground that it would work great injury to the defendant to stop immediately the flow of its sewage into the river, and for that reason suggested a substitutionary remedy, the resort to which was assented to by the defendant. These cases necessarily stand by themselves and are no authority for what the defendant

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here seeks to do. Another class of cases is illustrated by *Paterson and Newark Railroad v. Kamlah*, 47 N. J. Eq. (2 Dick.) 331. There a railroad company having the power of condemnation obtained possession of land which belonged to Kamlah; he brought ejectment. This court enjoined his suit and ascertained the value of the land and the damages and directed that he should make conveyance to the company upon payment of the amount so ascertained; but this was based upon the fact that the company had the right of condemnation, and the legislature had provided a method by which the railroad company might acquire title. There is nothing in the report to show whether the parties consented to that particular method of ascertaining the value or not. Vice-Chancellor Pitney refers to the remedies arising out of the power of condemnation in the case of *Sparks Manufacturing Co. v. Newton*, *supra*.

In *New York and Greenwood Lake Railroad Co. v. Stanley*, 34 N. J. Eq. (7 Stew.) 55; *affirmed*, 35 N. J. Eq. (8 Stew.) 283, there was an agreement between the defendants and the Montclair Railway Company by virtue of which that railway company entered upon the defendants' lands and constructed its railway over them. The railway company did not perform the covenants of the contract on its part to be performed; it failed, and after two foreclosures title to the railroad line came to the complainant company, which filed its bill to enjoin an action of ejectment which the defendants had begun, and to obtain title upon the performance of the agreement made by the Montclair Railway Company. The defendants, by their answer, declared their willingness to convey on receiving compensation for their land and damages assessed as of the date when the Montclair Railway Company went into possession, with interest. The chancellor held that the complainant had a right to equitable protection against the defendants' legal right to the same extent, and on the same terms, that the Montclair Railway Company would have been entitled to it, and thereupon assessed damages in accordance with the submission of the parties. On appeal the same position was taken.

In these cases and in all the other cases cited on the defendant's brief there was some right or some equity or some contractual



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relation which permitted the court to compel a transfer of title upon an ascertainment and payment of proper compensation. In the case at bar I find neither contract nor equity nor obligation of any kind on the part of the complainant which can be made the basis of the decree which the defendant seeks. She shall not lose her right because she did not immediately protest against the trespass. In short, the action of the defendant appears to me to be a pronounced disturbance of the complainant's right, begun without even a claim of right and continued deliberately and with the intention of compelling the defendant to yield to the demands of the complainant. This is a situation which no court of conscience could look upon with any degree of favor.

There was considerable argument on the question whether this court had the right to assess unliquidated damages, but in view of the result that I have reached it will be unnecessary to enter upon that somewhat vexed question.

I will advise a decree denying the defendant's motion for a preliminary injunction.

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In the matter of the sale of lands devised to ST. MICHAEL'S CHURCH, Atlantic City, by James Doris, deceased.

[Decided October 20th. 1909.]

1. Wherever a testator devises and bequeaths property for charitable uses, a residuary legatee under the will has no interest in the trust property save as one of the public, and can question the proceedings of the holder of such trust property only by bill and information preferred on behalf of himself and all others similarly interested, in conjunction with the attorney-general, representing the public, or by a class-bill making the attorney-general a defendant.

2. In proceedings for the sale of lands under public statutes, which proceedings are *cæ parte* and where no provision is made to let in anybody to defend, no one claiming right, title or interest in the lands may intervene in the proceedings, as such rights as he may have will not be affected by any order or decree that may be made in the premises.

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3. Where an act of the legislature provides for the sale of land in *ex parte* proceedings if it shall be made to appear that the interests of the owner thereof or of a particular estate therein will be promoted by such sale, the rights of others claiming interests in the premises will be protected by the limitation that the lands shall not be sold unless it be to the interest of such owner, as his interest protects the interest of all others claiming rights therein.

4. The act of April 17th, 1905 (*P. L. 1905 p. 287*), amended May 15th, 1907 (*P. L. 1907 p. 462*), authorizing the sale of land granted or devised to religious associations, or to corporations formed or existing for the purpose of education, or to officers or trustees of such corporation, in certain cases, is prospective and not retroactive.

5. An amendatory act, like other legislative enactments, takes effect only from the time of its passage and approval, and has no application to prior transactions, unless an intent to the contrary is expressed in the act or is clearly to be implied from its provisions.

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On application for sale of lands devised to a religious corporation, and on application of an individual for leave to answer and contest the application.

*Mr. Peter Backes*, for St. Michael's Church.

*Mr. Clarence L. Cole*, for Catherine Bloomer.

WALKER, V. C.

St. Michael's Church of Atlantic City, a religious corporation organized under the statute of this state, filed a petition showing that James Doris, late of Atlantic City, died September 9th, 1906, leaving a last will and testament which was duly admitted to probate; that by such will he gave to St. Michael's Church a tract of land and a legacy in the following words:

"I give, devise and bequeath unto St. Michael's Church of Atlantic City, New Jersey, the vacant lot of ground on Atlantic avenue, adjoining where I reside (one hundred and ten feet front by one hundred feet deep) for the purpose of building a church and school on said lot, and also direct that the sum of ten thousand dollars shall be given towards the building of said church on said piece of ground."

The petition proceeds to show that the lot so devised is located on Atlantic avenue, the main business thoroughfare of Atlantic City; that along the avenue is a double track overhead

trolley railway, the traffic on which is constant during the summer season and is continuous during the entire twenty-four hours of the day; that the avenue is traversed by all persons who enter or leave the city by automobile or other conveyances; that the traffic along the avenue is very noisy; that almost its entire frontage is used for stores, saloons and hotels; that the lot devised is located adjacent to a licensed saloon and barroom, and that stores and places of business surround it; that owing to the constant traffic and noise along the avenue and its close proximity to stores, saloons and other commercial establishments, the lot is unsuited for the purpose of erecting either a church or school building thereon; that the situation and circumstances of the place are such that the interests of the corporation will be promoted by a sale of the land and by devoting the proceeds thereof in erecting a church edifice for the use of the congregation upon other lands situated in a location more accessible to the immediate homes of the members of the congregation of the church, and one more desirable and suitable for church and school purposes.

The application of the church is based upon "An act authorizing the sale of land granted or devised to religious associations, or to corporations formed or existing for the purpose of education, or to officers or trustees of such corporations, in certain cases," approved April 17th, 1905 (*P. L. 1905 p. 287*), and the amendment thereto, approved May 15th, 1907 (*P. L. 1907 p. 462*).

The act mentioned, as amended, provides that the chancellor may, in a summary manner, by reference to a master, proceed to inquire into the merits of the application; and if it shall satisfactorily appear to the court that the interests of the petitioner will be better promoted by the sale or disposal of the property, the chancellor shall authorize and direct the petitioner to sell or dispose of the lands, or any part thereof, and that the proceeds may be invested in securities in which trustees are authorized by law to invest, or, in the discretion of the trustees, may be set apart and devoted to such use or uses not inconsistent with the nature and objects of the association or corporation as under the existing situation and circumstances in the place

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where the lands are located, will better promote the interests of the corporation, the determination of the trustees to be first reported to the chancellor to be approved by him before the proceeds shall be invested or set apart and devoted to such uses.

Upon filing the petition reference was made to a master who has reported that the devised lot is wholly unsuited for the location of a church and school, especially for the church and school of the petitioner, and that the interests of the petitioner will be better promoted by a sale of the lot and investment of the proceeds in the purchase of a lot in a locality free from the objectionable features of the devised lot, and more comfortable, accessible and available to the members of the congregation and school.

The petitioner moves for the confirmation of the master's report, and Catherine Bloomer, a sister of the devisor, who is the residuary legatee named in his will, petitions the court for leave to be let in to answer and contest the petition and offer proof to controvert the material and relevant facts therein set forth. She alleges that because her brother, James Doris, died after the act of 1905 became effective, the church cannot avail itself of the provisions of the act; that if the church is allowed to sell the land or cause the same to be used for any purpose other than a church or school, it will be contrary to the will of James Doris, whose wish it was that a church and school might be erected on the devised lot as a monument to his memory.

It is contended, on behalf of Catherine Bloomer, that she has an interest as residuary legatee under the will of her brother which will permit her to be heard to prevent a diversion of the trust estate. This contention, in my judgment, is untenable. The devise in question and the legacy bequeathed in conjunction with it are for charitable uses, and, therefore, the petitioner, Catherine Bloomer, is interested, if at all, only as one of the public. Therefore, she could only question the proceedings of the trustee, St. Michael's Church, in conjunction with the attorney-general, representing the public, by bill and information. *Larkin v. Wikoff*, 75 N. J. Eq. (5 Buch.) 462. Another remedy open to her would be a bill on behalf of herself and all others similarly interested, making the attorney-general a defendant.

See *Lanning v. Commissioners of Public Instruction*, 63 N. J. Eq. (18 Dick.) 1.

There is another reason why the petitioner cannot intervene in this cause, and that is, because no provision is made in the act under which these proceedings are taken for letting in anybody to defend. This being so, if Catherine Bloomer has any rights, they will not be affected by any order or decree that may be made in this cause.

In *Cool's Executors v. Higgins*, 23 N. J. Eq. (3 C. E. Gr.) 308, it was held:

"The rights or liens of encumbrancers who are not required to have notice, or who do not have notice of the proceedings, are not affected by the sale. The purchaser holds subject to legacies charged on the lands."

In that case Chancellor Zabriskie remarked (at p. 311):

"The act is not framed for avoiding liens or encumbrances. It requires no process. No notice is to be given, except to such persons as are entitled to vested or prospective estates in the premises. No provision is made for notice to encumbrancers or lien claimants. The proceeding can be by petition only, and not by bill, and no subpœna or other process can be issued."

So it is with the act under which we are proceeding in this matter. It merely provides that if it shall be represented to the chancellor that, &c., he may proceed in a summary manner by reference to a master to inquire into the merits of the application, &c. It is not even provided how the proceedings shall be instituted. In this the act is lame. It should, I think, have provided, as is usual in such cases, that the proceeding should be instituted by petition. However, there is no provision for charging any person as defendant, and no provision for the issuance of process, and, therefore, no one can be admitted to defend. In this situation, as already shown, no rights of third parties can be affected. If Mrs. Bloomer has any interest as one of the public it can be protected by a proceeding of the character above pointed out.

But, it would appear, that Mrs. Bloomer is protected in any event by the terms of the act under which these proceedings are

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taken, because it is provided in the act that a sale may be had only if it shall appear that the interests of the corporation will be promoted by a sale. Now, if she has interests, those claimed by the corporation are hers, and what would benefit the corporation would benefit her. Said Chancellor Zabriskie, in *Cool's Executors v. Higgins, supra* (at p. 312):

"The act only authorizes the sale where it will promote the interest of the owners of the particular and future estates, and when it would be the interest of anyone who might own the lands in fee to sell. This limitation of the power protects the tenant in remainder. If it will injure his interest the sale must not be directed. \* \* \* If this power is wisely exercised it will prevent all injury to the remainderman in cases where it would be the interest of the owner of the fee to sell."

Thus it would appear that the interest of Mrs. Bloomer, as residuary legatee, if any she has, would not be injured by a sale of the devised premises in these proceedings, for they would be ordered to be sold only if it appeared that the interests of the corporation who holds them to charitable uses would be promoted by the sale, and, as already remarked, the corporation's interests are her interests, if any she has.

So far as the claim that the church proposes by selling the land and acquiring another lot and building a church and school thereon, to divert the legacy of \$10,000, it is sufficient to say that that question cannot be litigated in this matter. Litigation concerning a legacy surely cannot be imported into a statutory proceeding for the sale of lands. As already pointed out Mrs. Bloomer's remedy, if she be entitled to any, is by bill and information, or by bill on behalf of herself and the class she represents, making the attorney-general a party defendant.

It was also contended on behalf of Catherine Bloomer that the act of April 17th, 1905, does not apply to wills made after its date. This contention, in my judgment, is not tenable; and while Catherine Bloomer is without standing to raise the question, it will, nevertheless, be noticed, as an examination of the statute under which these proceedings were instituted will disclose, that the trustees' case does not fall within its provisions.

The language of the statute is "Wherever lands and tenements may have been granted, conveyed or devised to religious associations," &c.

The supreme court, in *State, Alden, prosecutor, v. Newark*, 40 N. J. Law (11 Vr.) 92, held:

"The words shall have been, or shall be, in the act passed April 9th, 1875, to heal defects in public notices, are prospective and not retrospective. The intent to make statutes retroactive must clearly appear by express words or by necessary implication."

And Mr. Justice Scudder, speaking for the court, remarked (at p. 98):

"'Shall have been' is in the future perfect tense, which represents an event as completed in future time, and 'shall be' represents what will take place in future time. If the legislature had intended to make the law retroactive it would have been easy to express it by the use of the words *has been* or *had been*, in the present or past perfect tense, or other equivalent words."

The words "may have been" are also in the future perfect tense, and, therefore, it appears that the statute of 1905, by its very terms, is prospective and not retroactive. But it was materially changed by the amendment of 1907, and the petition preferred by St. Michael's Church is, of necessity, rested upon the amendatory act of May 15th, 1907, for the provisions of the latter superseded the former, so far as the amendment went. The first section of the original act provided that wherever lands and tenements may have been granted, conveyed or devised, &c., upon condition that they shall be held in trust for specific uses and purposes, and appropriating the rents, issues and profits thereof to specific use, but without power to sell and convey, and the specific use to which the rents, issues and profits thereof are dedicated can be enhanced by a sale or disposal of the lands, the chancellor may, in a summary manner, &c. By the amendatory act of 1907 (section 1), the original act is amended so as to provide that wherever lands and tenements may have been granted, conveyed or devised, &c., upon condition that they shall be held in trust for specific uses and purposes, and appropriating the rents, issues and profits thereof to specific use, but without power to sell and convey, *and the existing situation*

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*and circumstances in the place where the lands are located are such that the interests of the corporation will be better promoted either by the sale or disposal of the lands, or any part thereof, or by devoting them, or any part thereof, to some use or purpose not inconsistent with the nature and objects of the corporation other than the specific use or trust named in the instrument by which the lands are conveyed or devised, the chancellor may, in a summary manner, &c.* These were the only provisions existing after May 15th, 1907, the date of the approval of the amendment, and were not in force September 9th, 1906, when James Doris died. His devisee, St. Michael's Church, has not sought relief under section 1 of the act of April 17th, 1905, by showing that the specific use to which the rents, issues and profits of the land devised could be enhanced by sale or disposal of the same—it could not do so, as that provision of the act had been repealed at the time these proceedings were instituted by the enactment of the amendment. The statute as it originally stood looked entirely to enhancing the revenues of the lands granted or devised in trust. And this view is borne out by the third section of the original act, which provided alone for the investment of the proceeds of sale and the paying over of the interest arising thereon for the uses specified in the grant or devise. I repeat those provisions are no longer in force. Quite different are the provisions of the amendatory act of May 15th, 1907. The application referred to the court in this matter comes directly within section 1 of the amendatory act, and shows that the *existing situation and circumstances in the place where the lands are located* are such that the interests of the corporation will be better promoted by a sale thereof, and section 3, as amended, provides that the proceeds of sale may be either loaned and invested, or *be set apart and devoted to such use or uses not inconsistent with the nature and objects of the corporation* as under the existing situation and circumstances will better promote the interests of the corporation. Now it is quite obvious that if the land devised can be sold the proceeds of the sale may be invested in other lands in the same locality better suited to the uses and trusts in that behalf contained in the will of the deviser, and upon which trusts alone they may be used. Such disposition of the pro-



ceeds, it would seem, could not have been made if a sale could have been had under the act as it originally stood, but can be made if a sale under the amendatory act may be authorized. The devise was to use the land itself and not the issues arising therefrom.

But the language of the amendatory act, namely, wherever lands and tenements may have been granted, conveyed or devised to religious associations, &c., like the phraseology of the original act, is prospective and not retroactive, and, therefore, the will of the late James Doris does not fall within the provisions of the amendment, because he died in 1906, and the amendment did not go into effect until its approval on May 15th, 1907.

"An amendatory act, like other legislative enactments, takes effect only from the time of its passage and has no application to prior transaction unless an intent to the contrary is expressed in the act or clearly implied from its provisions." *26 Am. & Eng. Encycl. L. (2d ed.) 712 § 7.*

The supreme court of this state has held that the supplement to an act of the legislature goes into operation on the 4th of July next after its passage, unless otherwise specifically provided. *State, Vreeland, prosecutor, v. Town of Bergen, 34 N. J. Law (5 Vr.) 438.* In line with this case is that of *McLaughlin v. Newark, 57 N. J. Law (28 Vr.) 298*, in which the supreme court held (at p. 301) that an amendment to an existing statute, which, under our constitution, recites the amended section at length in the amending act, does not express an intention then to enact the whole section as amended, but only an intention then to enact the change which is indicated. That, of course, means that the original act stands from the time of its passage to the time of the amendment, after which time it still stands so far as not amended, and is changed from that time forth so far only as amended. See, also, *Schwarzwaelder v. German Mut. Fire Ins. Co., 59 N. J. Eq. (14 Dick.) 589 (at p. 593).* The rule has been stated as follows:

"The portions of the amended sections which are merely copied without change are not to be considered as repealed and again enacted, but to have been the law all along; and the new parts or the changed portions are not to be taken to have been the law at any time prior to the passage of the amended act. The change takes effect prospectively according to the general rule." *1 Lewis' Suth. Stat. Con. (2d ed.) 443 § 237.*

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Therefore, although Mrs. Bloomer has no standing to intervene in these proceedings, and although the master's report is abundantly supported by the depositions annexed to it, no order can be made for a sale of the devised lot and the investment of the proceeds and the purchase of another lot in Atlantic City in a locality free from the objectionable features of the one sought to be sold, because the amendatory act under which the application is made was not enacted until after the will of the decedent became operative, and as the terms of the amendment are prospective and not retroactive, a case is not made falling within the act now in force. Therefore, both the original application and the petition for leave to intervene must be dismissed.

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THE ARTISTIC PORCELAIN COMPANY

v.

NOAH W. BOCH, trading as The American Porcelain Works.

[Decided October 22d, 1909.]

1. A contract that the covenantor will not engage in a competitive business, although a contract in restraint of trade, is not opposed to public policy but is valid and enforceable, when the restraint contracted for is partial and is reasonably required for the protection of the covenantee in the use and enjoyment of the particular business the covenantor contracts not to carry on.

2. It will be presumed that the parties intended to make a valid contract and that they designed to provide a reasonable restraint.

3. Where the restraint is without qualification it is unreasonable and contrary to public policy; but where it is subject to some qualification, either as to time or space, the question is whether it is reasonable, and, if reasonable, it is good in law.

4. A contract founded upon adequate consideration that the covenantor will not engage in the manufacture or sale of white porcelain door knobs, unlimited as to space, but limited as to time to a period of approximately five years, is reasonable and will be enforced by injunction.

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On application for preliminary injunction.

*Mr. W. Holt Apgar*, for the complainant.

*Messrs. Clark & Case*, for the defendant.

WALKER, V. C..

The bill of complaint alleges that the complainant corporation, on July 25th, 1906, entered into an agreement in writing with the defendant, which recited that the complainant was then manufacturing black and brown door knobs, shutter knobs and wheels at the plant of the American Porcelain Works, so called, and the complainant thereby sold to the defendant all right, title and interest it might have in the goods, chattels, stock in trade, chemicals, materials and other personal property then on the plant of the American Porcelain Works, for which the defendant agreed to pay a certain price, and the agreement then proceeds:

"The said Boch further agrees as an important part of the consideration of this sale and transfer that he will abstain from the manufacture or sale, directly or indirectly, of porcelain, or of any imitation thereof, except tile, until January first, nineteen hundred ten, except as hereinafter provided, and the said Porcelain Co. agrees that so long as the said Boch will promptly furnish it with such black and brown door knobs as may be required of it by the Skillman Hardware Mfg. Co. not to exceed 150,000 in any one month until May first, nineteen hundred and ten, it will abstain from the manufacture or sale, directly or indirectly, of black and brown door knobs, mineral knobs, black and brown shutter knobs and black and brown wheel, and the said Boch further agrees that until said May first, nineteen hundred and ten, he will furnish to the Artistic Porcelain Co. for the said Skillman Hardware Mfg. Co. requirements of black and brown door knobs not to exceed 150,000 in any one month. said mineral door knob to be delivered to the Skillman Hardware Mfg. Co. and charged at \$5.50 per M and Jet at \$6.00 per M less 3% discount."

The parties had business relations with each other under this agreement, with perhaps some variations of its terms (other than those contained in the above-recited part), by mutual agreement, until April 7th, 1909, when they entered into another agreement containing, among others, the following stipulation:

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"It is further covenanted and agreed between the parties hereto that the stipulations, covenants and agreements contained in said contract of July twenty-fifth, nineteen hundred and six between the parties hereto by which the party of the second part binds himself not to manufacture porcelain ware excepting tile, until January first, nineteen hundred and ten and the party of the first part binds itself not to manufacture jet or mineral door knobs for the same period shall be and the same is hereby extended, as part of this agreement, for five years from said date, to wit, until the first day of January, nineteen hundred and fifteen."

On June 3d and 11th, 1909, the complainant ordered of the defendant certain jet and mineral knobs which the defendant refused to supply, writing the complainant under date of June 10th that the defendant did not care to fill the order and recognized no contract by which he might be compelled to do so, and on June 12th he also wrote the complainant referring him to the letter of the 10th, remarking that he meant exactly what he said and would fill no orders on the complainant's account.

The bill and affidavits show that in July and August, 1909, the defendant manufactured thousands of white porcelain door knobs and has the same in stock ready to be placed on the market and sold. The bill prays that the contract between the parties may be specifically enforced and that the defendant may be restrained from manufacturing or selling directly or indirectly any white or porcelain knobs during the period in the contracts mentioned, namely, until January 1st, 1915.

With the injunctive feature of the bill we are at present alone concerned.

Two defences have been interposed—*first*, that the agreements are void as being in restraint of trade, and *second*, that the complainant has violated the contract and the defendant has elected to rescind.

A contract that the vendor of a business will not engage in a competitive business, although a contract in restraint of trade, is not opposed to public policy but is valid and enforceable when the restraint contracted for is partial and is reasonably required for the protection of the purchaser in the use and enjoyment of the business purchased. *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. (13 Dick.) 507, 508. In that case the contract did not embrace one whole area, but several areas disjunctively de-

scribed, as the State of Maine, the State of New Hampshire or the State of New Jersey, and it was held that no restriction could be imposed upon the vendor as to any area beyond the State of New Jersey, but within that area an injunction should go restraining competitive business.

The latest case in our courts is that of *Fleckenstein Brothers' Co. v. Fleckenstein*, 71 Atl. Rep. 265, in which the defendant sold his business and covenanted not to engage in, promote or give his name to any similar business located within five hundred miles of Jersey City for twenty years. It was held that the restraint was only partial, and was severable and sustainable in so far as it applied to the city, even if unenforceable as to outside territory. The limitation as to time, independently of extent of territory or in connection with it, was not considered.

In these cases it is held that the court will presume that the parties intended to make a valid contract and that they designed to provide a restraint which will be reasonable. This, of course, is subject to the universal rule that the parties cannot make the law, but must follow it, and when, upon a given state of facts, a rule of law operates, it is inexorable, and the intention of the parties to the contrary must be overridden.

Now, it is perfectly obvious that the restriction as to territory in the agreement under consideration is unlimited. No areas are named as in the *Trenton Potteries* and *Fleckenstein Cases*, and therefore the court is given no opportunity to interpret the contract as to area, in respect to which question there is no room whatever for construction, there being nothing to construe. Therefore, tested alone by the question of extent of territory, the agreement appears plainly to be general and unlimited, and, consequently, inoperative and void. It remains to be seen whether the time limit of the extension agreement, being a period of approximately five years, makes the contract one of partial restraint to such an extent as to take it out from under the operation of the general rule.

In *Ping. Treat. L. Cont.* (1905), tit. "Restraint of Trade," 340 et seq., the author lays it down that the result of the English authorities appears to be that where the restraint is without qualification it is unreasonable and contrary to public policy,

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but where it is subject to some qualification, either as to time or space, the question is whether it is reasonable, and, if reasonable, it is good in law; that reasonableness depends upon all the circumstances, which must be duly weighed in each case; that the American decisions have not gone so far as the English, but that the old law has been a great deal modified in some jurisdictions; that the generality of time or space must always be an important factor in the consideration of reasonableness, although not *per se* a decisive test; that what is reasonable in a given case is a question not of fact, but of law, for the court.

There are cases holding that a restriction covering a period of five years is unreasonable, as in *Bishop v. Palmer*, 146 Mass. 469, and there are cases holding that such a limitation of time is not unreasonable, as in *Oakdale Manufacturing Co. v. Garst*, 18 R. I. 484.

From the affidavits submitted it is apparent that there is a large demand for white porcelain door knobs and that they can be readily sold. There is no showing that they are patented or that anyone has a lawful monopoly in them. I do not see that the rights of the public will be harmed by an enforcement of the agreement made by Mr. Boch, the covenantor.

Vice-Chancellor Green, in *Ellerman v. Chicago Junction Railways Co.*, 49 N. J. Eq. (4 Dick.) 217 (at p. 253), said (quoting from *Diamond Match Co. v. Roeber*, 106 N. Y. 473):

"To the extent that the contract prevents the vendor from carrying on the particular trade it deprives the community of any benefit it might have from his entering into competition. But the business is open to all others and there is little danger that the public will suffer harm from lack of persons to engage in a profitable industry. Such contracts do not create monopolies. They confer no special or exclusive privileges."

My judgment is that the covenant in question, which is certainly founded upon adequate consideration, is not one in illegal restraint of trade, but is valid and enforceable.

Several defences on the facts were urged at the hearing. One was that the defendant had been dragooned into making the contract. This contention is without force. He certainly was not subjected to any duress, and even if he dealt at some disad-

vantage with the complainant, being *sui juris*, he could have refused to deal at all. On this head no ground is presented justifying a refusal to enforce the contract.

Another defence was that the complainant had violated the contract and the defendant had a right to treat it as rescinded. Much of the claimed violation occurred prior to the agreement of April 7th, 1909, which expressly provides that the stipulations and agreements of the contract of July 25th, 1906, concerning the subject-matter of this suit, shall be extended for five years from January 1st, 1910. That is not all: Mr. Boch in his affidavit says that on May 24th, 1909, he signed and mailed to the complainant company a notice wherein he informed the complainant that under the contract of July, 1906, there was due to him, with reference to firing kilns, the sum of \$720 a year, amounting to over \$1,500; also that upon refusal of payment or recognition of the claim it would result in a forfeiture of the contract. Furthermore, in his affidavit he denies that with the exception of such modification as may be contained in the contract of April 7th, 1909, there was any modification agreed to by him concerning the subject-matter of the documents, and he says he denies that he consented to any modification of the condition concerning the firing of kilns.

Defendant makes the further contention that he is financially responsible and that the complainant has an adequate remedy at law. The innumerable instances in which a violation of a contract of the kind under consideration has been enjoined are rested upon the ground that from the nature of such cases just and adequate damages cannot be estimated for a breach of the contract, and that injunctive relief avoids a multiplicity of actions. The objection is not tenable.

The complainant, in my opinion, is entitled to the relief it seeks. The result is the order to show cause will be made absolute, and an injunction will issue according to the prayer of the bill. The complainant is entitled to costs against the defendant.

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## THE TITLE GUARANTEE LAND COMPANY

v.

THE MAYOR AND ALDERMEN OF THE CITY OF PATERSON et al.

[Decided December 24th, 1909.]

1. As to whether a subsequent legislative act repeals by implication a former one, the canon of construction is: If both acts can stand together both shall stand, but if they are so repugnant to each other that both cannot stand together, the former gives place to the latter.

2. There is no repugnancy between the act of March 30th, 1886, commonly called the Martin act (*Gen. Stat. p. 3370*), and the act of April 8th, 1903, commonly called the General Tax act (*P. L. 1903 p. 394*), and therefore the latter does not repeal by implication any of the provisions of the former.

3. A sale of land by the city of Paterson under the provisions of the Martin act as amended by the supplement of June 2d, 1905 (*P. L. 1905 p. 497*), is valid.

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On final hearing on pleadings and agreed state of facts.*Mr. Thomas C. Simonton*, for the complainant.*Mr. Edward F. Merrey*, for the defendants.

WALKER, V. C.

The city of Paterson, under appropriate proceedings, sold a lot or tract of land belonging to the complainant, by virtue of the provisions of the act entitled "An act concerning the settlement and collection of arrearages of unpaid taxes, assessments and water rates or water rents in cities of this state, and imposing and levying a tax, assessment and lien in lieu and instead of such arrearages, and to enforce the payment thereof, and to provide for the sale of lands subjected to future taxation and assessment," approved March 30th, 1886 (*Gen. Stat. p. 3370*), commonly called the Martin act.



The complainant's contention is that the Martin act was repealed by the act entitled "An act for the assessment and collection of taxes," approved April 8th, 1903 (*P. L. 1903 p. 394*), commonly called the General Tax act, and that, therefore, the sale is *ultra vires* and a cloud upon its title, which it seeks to have removed. A companion act to the one last mentioned is the act entitled "An act to repeal sundry acts concerning taxes," also approved April 8th, 1903. *P. L. 1903 p. 436*. The unquestioned object of the latter act was to repeal prior acts inconsistent with the former, and it is significant that it contains no repealer of the Martin act. Besides this repealing act, the General Tax act, in its last section, contains a repealer of all acts, general and special, inconsistent with its provisions; and whether it did so or not, it would operate to repeal all inconsistent provisions in other acts.

The complainant insists that the provisions of the Martin act relating to the collection of taxes in arrears, is, by implication, repealed by the General Tax act, which, among other things, provides a method for the collection of delinquent taxes. The method and character of sale provided for in the General Tax act is to be found in *P. L. 1903 p. 428 § 52*, as amended by *P. L. 1906 p. 387*. There is no substantial change made by the amendment. The provision is that the land shall be sold to such person as will purchase the same for the shortest term, or in fee where no one will bid for a shorter term. As is well known, all sales under the Martin act are made in fee.

As to whether a subsequent act repeals by implication a former one, the canon of construction is: If both acts can stand together both shall stand, but if they are so repugnant to each other that both cannot stand together, the former gives place to the latter.

Let us examine the two acts to see if there be discoverable in them any such repugnancy as will operate as a repeal of the former.

Prior to the passage of the General Tax act of 1903, taxes were assessed and collected in cities of the state under charters, and the provisions of the Martin act were applicable to such municipalities only in case the board having control of their

finances adopted it and put it in force. In other words, it was elective whether or not proceedings for the collection of taxes in arrears be had under the provisions of the Martin act. The General Tax act of 1903 made the proceedings for assessment and collection of taxes uniform throughout the municipalities of the state. And, as already asserted, the latter's companion repealing act did not repeal the Martin act. In this connection it is significant to note that the legislature since the passage of the General Tax act of 1903 has passed six supplements to the Martin act, as follows: March 29th, 1904 (*P. L. 1904 p. 345; P. L. 1904 p. 381*); June 2d, 1905 (*P. L. 1905 p. 490; P. L. 1905 p. 497*); May 17th, 1906 (*P. L. 1906 p. 551*); March 10th, 1908 (*P. L. 1908 p. 24*).

The Martin act concerns not alone the settlement and collection of arrearages of unpaid taxes, but also assessments and water rates or water rents, and imposes and levies a tax, assessment and lien in lieu and instead of such arrearages and enforces the payment thereof. Now, to hold that the Martin act was repealed, or, rather, that its tax collecting features were repealed by the General Tax act of 1903, which latter act provides only for the levying and collection of taxes, would be by construction and implication to override the salutary provisions of the Martin act which permit taxes, with assessments and water rates, to be collected together and at the same time. Such a result can only be reached if the provisions of the General Tax act admit of no construction other than the logical repeal, by implication, of the provisions of the Martin act. The omission of any repealer of the Martin act by the legislature of 1903, coupled with the fact that four legislatures since that year have passed supplements to that act, leads to the view that the legislature has at all times considered the Martin act in force and effect, notwithstanding the General Tax act. Then, too, the General Tax act does not legislate upon the whole subject of the Martin act, which is a reason for believing that the legislature did not intend by implication to repeal that act.

A late case on the subject of repeal by implication is that of *Hotel Register Corporation v. Stafford*, 70 N. J. Law (41 Vr.) 528, opinion by Mr. Justice Pitney, now chancellor. In that

case it was held that a portion of the revised Attachment act, which authorizes the issuance of an attachment against the property of an absconding and non-resident debtor, is not impliedly repealed by section 84 of the revised Practice act, which permits an action to be commenced by attachment in certain cases, and it is said (at p. 536) :

"It may further be remarked that section 84 of the Practice act is not by its terms exclusive of the former practice by attachment. It permits but does not require. So far as cases covered by the Attachment act are concerned, it furnishes a concurrent remedy." See, also, *Board of Health v. Ihnken*, 72 N. J. Eq. (2 Buch.) 865.

Now, if the contention of counsel for the complainant were to be adopted, it would destroy the concurrent remedy given to cities for the collection of taxes in arrears by the adoption of the Martin act in lieu of the proceedings under the General Tax act, and would deprive the cities of the advantage of adjusting arrears of taxes along with arrears of assessments and water rates at the same time. This consequence could not, I think, have been in the legislative mind at the time of the passage of the General Tax act, and as this question of implied repealer is always one of legislative intent, when the intent to repeal is palpably lacking, repeal does not take place. *Board of Health v. Ihnken*, *supra*.

By the supplement to the Martin act, approved June 2d, 1905 (*P. L. 1905 p. 497*), it is provided that lands may be sold for taxes and assessments levied in any city, and which then were or should thereafter become unpaid and in arrears for the space of two years from and after the time when due and payable, in the discretion and upon the direction of the board having charge of the control of the finances of the city; and the complainant here admits that the sale in question in this cause was lawful, if the act just mentioned is constitutional; but asserts that the Martin act, being repealed by the General Tax act, that article 4, section 7, of the constitution, which inhibits the revival of acts by reference to their title, and provides that an act revived shall be inserted at length, operates to invalidate the act of June 2d, 1905, because it attempts to revive the Martin act without

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inserting its provisions at length. However, it is not necessary to examine this contention, because, as I view it, the Martin act was never repealed by the General Tax act, and, consequently, there is no attempt by the act of June 2d, 1905, to revive any defunct act.

These views lead to the conclusion that the sale in question was lawful, and that, therefore, the complainant's bill should be dismissed.

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EDMUND WILSON, attorney-general of the State of New Jersey,

v.

HUDSON COUNTY WATER COMPANY et al.

[Decided January 14th, 1910.]

1. The State of New Jersey is the owner in fee of all the lands below high-water mark in navigable tidewaters and arms of the sea within its borders in virtue of its sovereignty as successor to the king of England; and such ownership extends from ordinary high-water mark to the centre of the Kill von Kull, which is the boundary line between the States of New Jersey and New York.

2. The provisions of section 10 of the act of congress of March 3d, 1899, commonly called the River and Harbor act, were designed to protect the navigable waters of the United States (including the Kill von Kull) from encroachment and from obstructions to navigation, and to commit the duty of their protection to an officer of the federal government, without whose permission no such obstructions can be made. The act is a mere regulation for the benefit of commerce and navigation, and the license or permission of the secretary of war is only a finding and declaration that a proposed structure or excavation would not interfere with or be detrimental to navigation, and is not equivalent to a positive declaration by the authority of congress that the licensee may make such obstruction or excavation without first obtaining the consent of the owner of the submerged land. It is not an enactment touching the rights of the owner of such land, and the license given to the Hudson County Water Company by the secretary of war to excavate in and lay pipes across the Kill von Kull from Bayonne, in New Jersey, to Staten Island, in New York, is a mere declaration by the official named that the proposed work will not interfere with navigation, is strictly permissive, and

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is not an authority to do the work in the absence of consent thereto by the State of New Jersey, the owner of the land.

3. The proposed excavation and laying of a pipe line through the lands of the State of New Jersey under the waters of the Kill von Kull by the Water Company without the consent of the state is an act in excess of the Water Company's corporate powers, and will be arrested by a preliminary injunction without the necessity of irreparable injury to the state's rights being shown.

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On application for preliminary injunction.

*Mr. Edmund Wilson, attorney-general*, for the State of New Jersey.

*Mr. Robert H. McCarter*, for the defendants.

WALKER, V. C.

The attorney-general has filed an information on behalf of the state in which he shows that the J. M. Guffey Petroleum Company obtained from the riparian commissioners a grant of lands under the waters of the Kill von Kull at the foot of Ingham avenue in Bayonne. In the grant it was provided that that part of the land under water lying between the exterior line for piers and the exterior line of solid filling, established by the commissioners appointed under our act of the legislature and approved by the secretary of war, was not to be used for any purpose whatever except the erection of a pier or piers underneath which the tide might ebb and flow; and it was further provided that the state might grant or lease any of the lands of the state lying in front of the exterior line for solid filling or piers mentioned and referred to, for the cultivation of oysters or other fish, or for any other purpose whatever, provided that such grant should not operate to interfere with the reasonable use of, and access by water to, the lands under water thereby conveyed or with the free and uninterrupted navigation between its lands and the main channel of the Kill von Kull. The information further shows that the state has not made any grant or lease for any purpose whatever of any of its lands lying in front of the exterior line for solid filling or piers above mentioned, or piers in the grant to the J. M. Guffey Petroleum Company, and that the

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state is the owner of all the land lying under the waters of the Kill von Kull to the middle thereof from the exterior line for piers referred to in the grant. That between the last mentioned exterior line and the boundary line in the Kill von Kull between the States of New Jersey and New York is approximately five hundred feet. That the defendant, the Hudson County Water Company, is now and for some time past has been dredging the land under the waters of the Kill von Kull in a line approximately parallel to Ingham avenue, Bayonne, and extending from the northerly shore of the Kill von Kull on the New Jersey side to and beyond the middle of the Kill, which middle is the boundary line between the States of New Jersey and New York; and that the dredging is being done for the purpose of placing submerged pipes thirty inches in diameter under the surface of the bed of the Kill, and that it is the purpose of the defendant to lay its line of pipes from the exterior line for solid filling granted to the J. M. Guffey Petroleum Company to the centre line of the Kill von Kull, a distance of approximately six hundred and seventy-five feet, without any lawful warrant or authority therefor.

Upon filing the information, duly verified, an order was made requiring the defendants, the Hudson County Water Company and the J. M. Guffey Petroleum Company (which will hereinafter be called respectively the Water Company and the Guffey Company), to show cause why they and their officers, agents and servants should not be enjoined and restrained from dredging, or permitting to be dredged, any of the lands of the State of New Jersey lying in front of the exterior line for solid filling, referred to in the riparian grant to the Guffey Company, for the purpose of laying pipes thereon, and from laying any pipe or pipes on any of the lands under the waters of the Kill von Kull from such exterior line to the middle of the Kill, which order contained an *ad interim* stay.

And now, on the return of the order to show cause, the Water Company, one of the defendants, files its answer, and moves the court to discharge the order and vacate the restraint.

The answer sets up that prior to the issuance of the restraining order the Water Company had been engaged in dredging the

land in question for the purpose of placing two submerged steel or iron pipes underneath the surface of the bed of the Kill to enable it to transport water therein to Staten Island, in the State of New York, for the purpose of supplying the borough of Richmond, in that state, with water, pursuant to certain contracts made between it (the Water Company) and the city of New York, which pipes are to be connected with pipes belonging to the Water Company connected with wells on its lands in the township of Bellville, in the county of Essex, in this state, for the purpose of transporting water pumped, and to be pumped, from the wells to Staten Island, and by virtue of its contractual obligations with the city of New York, a citizen of the State of New York, for the purpose of supplying it with water as a commodity, the Water Company is advised that, under the law of the land, it is justified and authorized to do the work threatened and complained of, and in so doing it will be engaged in interstate commerce, and that the pipes so to be laid in the bed of the Kill von Kull, which is a navigable stream, partly in the State of New Jersey and partly in the State of New York, will be appliances and facilities of such interstate commerce. That prior to the commencement of the work of excavation, and on or about December 9th, 1904, pursuant to the terms and provisions of section 10 of the so-called River and Harbor bill of the congress of the United States, approved March 3d, 1899, the Water Company laid before the chief engineer of the United States army and procured his recommendation, and also procured from and by the authority of the acting secretary of war, a license to lay pipes in the bed of the Kill von Kull. That by virtue of the authority bestowed by the constitution of the United States upon congress to regulate commerce between the states, congress was authorized to enact section 10 of the so-called River and Harbor bill, and that the secretary of war, upon the recommendation of the chief of engineers, was likewise authorized and empowered to give the license above mentioned, and that the Water Company, under that license, is justified in dredging the bed of the Kill von Kull for the purpose of laying pipes therein without the sanction and permission, and in spite of the objection, of the State of New Jersey, and that its federal license is supreme and

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sufficient to justify it in digging the trench and laying therein the water pipes for the purpose above indicated. That before commencing dredging, the Water Company procured from the Guffey Company a grant or license to lay pipes in, over and along its riparian lands, and thereby procured and enjoys the right to lay the pipes in, over and along the only private property in the State of New Jersey, or private rights, which the pipes when laid will in any way invade or affect. The defendant denies that the State of New Jersey is the owner of all the lands lying under the waters of the Kill von Kull from the exterior line for piers mentioned in the grant to the Guffey Company to the extent of being thereby endowed with any rights therein as against the federal government or its licensee when engaged in constructing an instrumentality of interstate commerce. And, finally, the Water Company claims a right under the constitution and laws of the United States, and says that this case presents a controversy arising under such constitution and laws, and that the effort of the informant to arrest or interfere with it in the execution of its plans, is contrary to the constitution and laws of the United States, and prays the benefit and advantage thereof.

As already said the information alleges that the state is the owner of all the land lying under the waters of the Kill von Kull to the middle thereof, and, while the answer denies that the state is the owner of those lands to the extent of being thereby endowed with any rights as against the federal government or its licensee when engaged in constructing an instrumentality of interstate commerce, there is no denial of the fact of the state's ownership of the land. By the settled law New Jersey is the owner in fee of all the lands below high-water mark in navigable tidewaters and arms of the sea within its boundary in virtue of its sovereignty as successor to the king of England. *Arnold v. Mundy*, 6 N. J. Law (1 Halst.) 1, 77; *Gough v. Bell*, 21 N. J. Law (1 Zab.) 156; *Attorney-General v. Hudson Tunnel Railroad Co.*, 27 N. J. Eq. (12 C. E. Gr.) 176, 181; *Simpson v. Moorhead*, 65 N. J. Eq. (20 Dick.) 623. And such ownership extends from ordinary high-water mark to the centre of the



Kill von Kull, which is the boundary line between the States of New Jersey and New York. This is not denied by the Water Company but is tacitly admitted in its answer. See, also, *Stockton v. Baltimore and New York Railroad Co.*, 32 Fed. Rep. 9.

There are no disputed facts, and the verified answer of the Water Company imports into the case the question of its alleged rights in the premises under the constitution and laws of the United States and the action of the officers of the federal government in pursuance of powers conferred by act of congress.

The power to do the thing proposed is said to exist under section 10 of the act of March 3d, 1899, which section reads as follows:

"Sec. 10. That the creation of any obstruction not affirmatively authorized by congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the chief of engineers and authorized by the secretary of war; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition or capacity of any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the chief of engineers and authorized by the secretary of war prior to beginning the same."

So much of the section just quoted as may be said to have any application to the case in hand may be stated thus:

"The creation of any obstruction to the navigable capacity of any of the waters of the United States is prohibited, and it shall not be lawful to build any structure in any navigable water of the United States outside established harbor lines or where no harbor lines have been established, except on plans recommended by the chief of engineers and authorized by the secretary of war; and it shall not be lawful to excavate or fill in any navigable water of the United States unless the work has been recommended by the chief of engineers and authorized by the secretary of war."

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It is conceded that the proper recommendation and authority from the federal officials have been obtained, and the question is, Is it plenary or permissive only?

The Water Company claims that it is engaged in interstate commerce and places reliance upon the case of *Stockton v. Baltimore and New York Railroad Co.*, *supra*. That was a case involving the right of a railroad company to construct and maintain a bridge across the Arthur Kill from the State of New Jersey to Richmond county, Staten Island, New York. The attorney-general of New Jersey filed an information in this court against the railroad company, praying for an injunction to restrain the erection of the bridge upon the lands of the state situate on the shore and under the waters of the Kill. The chancellor granted a preliminary injunction and the defendants removed the case, as one arising under the constitution and laws of the United States, to the circuit court of the United States for the district of New Jersey, and filed an answer and moved to dissolve the injunction, which application was granted. The grounds of the information were that the state was owner of the shore and land under the water of all navigable streams and arms of the sea within its border in fee-simple absolute, and that at the place of location of the proposed bridge its ownership extended from ordinary high-water mark to the centre line of the sound, being the boundary line between New Jersey and New York; and Mr. Justice Bradley, speaking for the judges of the circuit court (at *p. 20*), said:

"We think that the power to regulate commerce between the states extends, not only to the control of the navigable waters of the country and the lands under them for the purposes of navigation, but for the purpose of erecting piers, bridges and all other instrumentalities of commerce which, in the judgment of congress, may be necessary or expedient.

"Entertaining these views with regard to the power of congress among the several states, including that of the navigable waters of the country and the lands under the same as subsidiary to that end, we have no hesitation in declaring our opinion to be that the authority given by the act of June 16th, 1886, to build the bridge in question, and, for that purpose, to erect the

necessary piers of such bridge upon the lands under the water of Arthur Kill, is valid and constitutional, and does not injuriously affect any property or other rights of the State of New Jersey."

Now, it is to be observed that the act under consideration in *Stockton v. Baltimore and New York Railroad Co.* was one making it lawful for the Staten Island Rapid Transit Company and the Baltimore and New York Railroad Company, or either of them, to build and maintain a bridge across the Staten Island sound or Arthur Kill from New Jersey to New York for the passage of railroad trains, with provisions against obstruction of navigation. The structure was intended to facilitate interstate commerce, although it was not so expressly stated in the act.

Whether the land of the state, assuming that congress could authorize its taking without the consent of the state, could be taken without compensation made, was a question adverted to but left undecided in the opinion.

Quite different from the act considered and construed in *Stockton v. Baltimore and New York Railroad Co.* is that under which the Water Company claims in the case at bar. The act with which we are here concerned is known as the River and Harbor act of March 3d, 1899, and is entitled "An act making appropriations for the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes." Section 1 makes appropriations for the improvement of various rivers and harbors; 2 concerns preliminary surveys; 3, 4, 5 and 6 concern the Isthmian canal; 7 and 8 require certain reports from the chief of engineers of the United States army; 9 authorizes the construction of bridges over navigable waters; 10 provides against obstruction to the navigable capacity of any of the waters of the United States; 11 provides for the establishment of harbor lines; 12 provides that any person or corporation who shall violate any of the provisions of 9, 10 and 11 shall be guilty of a misdemeanor and on conviction be punished by a fine or imprisonment in the case of natural persons, and provides that the removal of any structure erected in violation of the provisions of those sections may be enforced by injunction of any circuit court exercising jurisdiction in

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any district in which such structures may exist, proceedings to be instituted under the direction of the attorney-general of the United States; 13 makes it unlawful to deposit refuse in navigable waters, provided that whenever, in the judgment of the chief of engineers, anchorage and navigation will not be injured thereby, the deposit of certain material within defined limits and under prescribed conditions may be made; 14 makes it unlawful to build, alter, destroy or injure any sea wall or other work built by the United States and used in connection with the preservation and improvement of any of its navigable waters; 15 makes it unlawful to anchor vessels in navigable channels in such manner as to prevent the passage of other vessels or craft; 16 prescribes penalties for the violation of 13, 14 and 15; 17 provides that the department of justice shall conduct the legal proceedings necessary to enforce the provisions of sections 9 to 16, inclusive; 18 provides that the secretary of war shall under certain conditions as to notice, &c., cause the alteration of any railroad or other bridge which is an unreasonable obstruction to free navigation; 19 provides for the removal of obstructions to navigation caused by sunken craft; 20 is to the same effect; 21 concerns advertisement for bids, and 22 directs certain preliminary surveys to be made.

Thus it will be seen that besides making appropriations for public works on rivers and harbors, the "other purposes" for which the bill was passed were the prevention of obstruction to navigation, the construction of bridges over navigable waters, and the providing of penalties for infractions of various sections of the act; which act has been construed strictly, because it is in derogation of common law rights.

*Willink v. United States*, 38 Ct. Cl. 693, was the prosecution of a claim for damages against the federal government for injury to the lands of a riparian owner on the Savannah river arising out of the doing of harbor work at Savannah. The construction of a prior river and harbor act was involved. Said the court of claims (at p. 703):

"As to the act of 19th September, 1890, upon which these officers seem to have based their action, it is one of those statutes which, being against common right, is to be strictly construed

and which is to be interpreted and applied in accordance with the constitutional rights of individuals."

If the act is in derogation of common right and is to be strictly construed, it certainly does not give any right against a sovereign state except in respect to those things which are strictly within its purview.

United States Attorney-General Olney, in an opinion to the secretary of war, May 31st, 1893, answering the question whether it was the duty of the war department to serve a notice upon the State of Rhode Island under the River and Harbor act of 1890, looking to the removal of a bridge owned by it because it was found to be an obstruction to navigation, said:

"In my opinion the words 'persons, corporation or association,' in the statute do not include a sovereign state." 20 *Op. Atty. Gen.* 606.

A case of strict construction, it will be observed.

United States Attorney-General John W. Griggs, in an opinion to the secretary of war, February 10th, 1899 (22 *Op. Atty. Gen.* 332), concerning the construction of section 7 of the act of July 13th, 1892 (27 *Stat. at L.* 88), which section originally formed part of the River and Harbor act of 1890, said that the section consisted of three distinct affirmative clauses, followed by a proviso in the nature of a limitation, which embraced two separate clauses, which for convenience he analyzed, and which are here more shortly analyzed, as follows:

(a) It shall not be lawful to build any wharf, pier, &c., outside established harbor lines, &c., without permission of the secretary of war, &c.; (b) it shall not be lawful to commence the construction of any bridge, piers, &c., in any navigable waters, &c., until the location and plan have been approved by the secretary of war; (c) or to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of any port, roadstead, haven, harbor, harbor of refuge, or enclosure within the limits of any breakwater, or of the channel of any navigable waters of the United States, unless approved and authorized by the secretary of war: provided (1) that this section shall not apply to any bridge, &c., the construction of which has been heretofore authorized by law: (2) or be so construed

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as to authorize the construction of any bridge, drawbridge, bridge piers and abutments, or other works under an act of the legislature of any state, over or in any stream, port, roadstead, haven, or harbor, or other navigable waters not wholly within the limits of such state; and he said (at p. 337) :

"It appears to me that the second paragraph of the section and both paragraphs of the proviso had in view this condition of the law (the fact that congress might give original authority for the erection of bridges when called for by the demands of interstate commerce, but in many cases had only given its assent to those erected under state authority), and this practice with reference to the subject of bridges and similar structures over navigable waters. It is not, in my judgment, intended by this act that plenary power should be conferred upon the secretary of war to authorize the construction of bridges and similar works over navigable waters of the United States, but to substitute a new method by which the assent of the United States should be required in all future cases, but without the necessity of a special act of congress in each case. It will be observed that the particular class of structures enumerated in the second clause of the section and in both the clauses of the proviso are substantially the same, namely, bridges, bridge-draws, bridge piers and abutments. The second clause of the section and the second clause of the proviso have the additional phrase 'or other works.' But under a well settled practice of statutory interpretation, these words are not to be used according to their natural and usual sense, but are restricted to things of the same kind as those just enumerated." *South. Stat. Con. 272.*

And (at p. 339) :

"It may have been anticipated by congress that a contention might arise \* \* \* on this point, and \* \* \* the second clause of the proviso was inserted as a precautionary measure. This was not a limitation upon the authority of the secretary of war, but a limitation upon the interpretation of the act. The proviso does not say that this section shall not be so construed as to authorize the secretary of war to authorize the construction of any bridge, but it reads 'this section shall not be so construed as to authorize the construction of any bridge,' &c.

The obvious purpose was to prevent the construction of bridges over such waters as were boundary waters, upon the mere authority of one of the riparian states. If the proper acts of authorization were passed by the legislatures of both states I do not think the secretary of war would be prohibited from approving the plan and location of a bridge across boundary waters."

And then he went on to say that the dredging of the canal, which was the subject of his inquiry, had been theretofore assented to and approved by the war department, and he saw no reason for withdrawing that consent whether it was a work over which the secretary of war had or had not any jurisdiction; that if it required his approval then it was properly given, and because the company had prosecuted its work in good faith and expended large sums of money it ought not to be revoked.

In the opinion just referred to the eminent attorney-general advised the secretary of war that, in his judgment, the act in question, which is similar to that under which the Water Company claims in this case, did not confer upon him, the secretary, power to authorize the construction of bridges and similar works over navigable waters, but simply provided the method by which the assent of the United States to the construction of such works over navigable waters should be had without the necessity of a special act of congress in each case. Look at the third clause of the section considered by the attorney-general. The provision is, that it shall not be lawful to excavate or fill or in any manner to alter or modify the course, location, condition or capacity of any port, roadstead, haven, harbor, harbor of refuge, or enclosure, within the limits of any breakwater, or of the channel of any navigable waters of the United States, unless approved and authorized by the secretary of war. Now look at the third clause of section 10 of the present act. It provides that it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of any port, roadstead, haven, harbor, canal, lake, harbor of refuge or enclosure within the limits of any breakwater, or of the channel of any navigable waters of the United States, unless the work has been recommended by the chief of engineers and authorized by the secretary of war prior to the beginning of

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the same. The two provisions are identical in substance, and almost identical in language. The only differences are, that canals and lakes are included in terms in the act of 1899, and the authorization by the secretary of war to the doing of any such work is made to depend upon its being first recommended by the chief of engineers. The opinion of the learned attorney-general that by the act of July 13th, 1892, it was not intended that "plenary power should be conferred upon the secretary of war to authorize the construction of bridges and similar works over navigable waters of the United States," is just as applicable to the provisions of section 10 of the act of 1899; and if excavating in the bed of the Kill von Kull for the purpose of laying a pipe line in the trench can be said to be a work which may be authorized by the secretary of war upon proper recommendation by the chief of engineers, which may be conceded, still, it is an authorization which the secretary may effectively give, only in the event of the party asking it having the right under authority, state or national, to do the work. In other words, the work cannot be done without such authorization, no matter if plenary authority for the doing thereof, independently of the secretary's authorization, existed. Such work, namely, excavating, is in the same situation as the construction of bridges over navigable waters, and the language of the attorney-general, viz.: "Similar works over navigable waters," may well be interpreted to mean "works under navigable waters," and excavating in the Kill von Kull is certainly work under water.

Section 10 of the act of 1899 may be searched in vain for the discovery of any affirmative grant of right or power for the construction of any instrumentality of commerce. The section is entirely negative and prohibitive in character. It is intended to prevent obstruction to navigation, and that alone. As already seen, it is an act in derogation of common law rights and is to be strictly construed. To say that it is authority for the prosecution of a work or works in or under any of the navigable waters of the United States, unless those works have first been affirmatively authorized by proper authority, either state or federal, is, in my judgment, to give the section a meaning which is unsupported by any rule of construction known to the law.



The supreme court of the State of Illinois has decided that the authorization of work by the secretary of war is a mere license to do the work and not a grant of power to do it. That court held in *Cobb v. Lincoln Park*, 202 Ill. 427 (at p. 437), as follows:

"Appellant also claims that by virtue of the license from the secretary of war he is entitled to build this wharf, because, as he says, a license from the executive officer of the government to build this wharf means permission and authority from the United States government to do so, and such permission and authority being granted neither the state nor any of its agents have any control over the subject-matter. He refers to the River and Harbor act of congress of September 19th, 1890 (26 Stat. at L. ch. 907 p. 426), as sanctioning his contention. Section 7 of this act was superseded by sections 9 and 10 of the River and Harbor act of March 3d, 1899. 30 Stat. at L. ch. 425 pp. 1121, 1151. Section 10 of the latter act is as follows: '\* \* \* These provisions of the law were designed to protect the navigable waters of the United States from encroachment and from obstructions to navigation and commit the duty of their protection to an officer of the general government, without whose permission no structures can be erected in them.'

"It is conceded that the power of congress over the navigable waters of the country is derived from the commerce clause in the constitution of the United States, and that it is exclusive and paramount whenever congress has definitely spoken on any subject under its jurisdiction. It has been held by the federal courts that when congress has authorized the erection of a bridge it is not necessary to obtain the consent of the state authorities for its erection, and that no compensation need be made to the state for the use of its property in the lands under water (*Stockton v. Baltimore and New York Railroad Co.*, *supra*), and that an individual has no claim for compensation when the general government erects piers on his submerged lands in aid of navigation and thus cuts off his access to the water. *Scranton v. Wheeler*, 179 U. S. 141. But, however that may be, we are of the opinion that the act prohibiting the erection of wharves without the consent of the secretary of war is a mere regulation

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for the benefit of commerce and navigation, and that the license or permission of the secretary of war is only a finding and declaration of such officer that such proposed structure would not interfere with or be detrimental to navigation, and not that it is equivalent to a positive declaration by the authority of congress that the licensee may build the wharf or other structure without first obtaining the consent of the owner of the submerged land on which it is his purpose to build. Appellant not having, by the law of this state, the right to construct a wharf over his neighbor's submerged lands without his neighbor's consent, could not acquire that right without his neighbor's consent by obtaining a license from the secretary of war.

"We are further strengthened in this view by section 11 of the act of congress of 1899 (a substantial re-enactment of section 12 of the act of 1890), which authorizes the secretary of war to establish harbor lines beyond which no piers, wharves, bulkheads or other works shall be extended except under such regulations as may be prescribed from time to time by him. When harbor lines are established no permit or license from the secretary of war is necessary to build a wharf not extending beyond such lines. It certainly cannot be said that, because the statute does not make a license necessary in such a case, a riparian owner can build his wharf within the harbor lines in a state where the right to wharf out is not recognized, without the consent of the owner of the submerged land. The fixing of harbor lines is only a finding by an officer of the government that erections within such lines will not injure or interfere with navigation. If parties choose to build within such harbor lines the general government will not interfere. It is not a declaration touching the rights of the owners of the submerged lands in the harbor. When harbor lines are not established, or beyond established harbor lines, the permission of the general government to build a wharf in navigable waters is necessary. But such permission is not given to override the rights of the owners of the submerged lands. It is, as said above, a declaration by the guardian of the interests of the public at large that the proposed structure will not interfere with navigation. It is strictly

permissive, and not an authorization by paramount authority to build the structure."

The doctrine of *Cobb v. Lincoln Park*, as applicable to the case under consideration, may be paraphrased as follows: The provisions of section 10 of the River and Harbor act of March 3d, 1899, were designed to protect the navigable waters of the United States (including the Kill von Kull) from encroachment and from obstructions to navigation, and to commit the duty of their protection to an officer of the general government without whose permission no such obstructions can be made; that the act is a mere regulation for the benefit of commerce and navigation and that the license or permission of the secretary of war is only a finding and declaration that a proposed structure or excavation would not interfere with or be detrimental to navigation, and is not equivalent to a positive declaration by the authority of congress that the licensee may make such obstruction or excavation without first obtaining the consent of the owner of the submerged land; that the Water Company, not having by the law of this state the right to excavate on the submerged lands without the state's consent, could not acquire that right by obtaining a license from the secretary of war; that the act is not a declaration touching the rights of the owner of the submerged lands in question, and, assuming that the permission of the general government to the excavation and laying of the proposed pipe line is necessary, such permission is not given to override the rights of the owner of the submerged lands, namely, the State of New Jersey; and it is, as said, the declaration by the guardian of the interests of the public at large that the proposed work will not interfere with navigation, and is strictly permissive, and not an authorization by paramount authority to do the work proposed. Thus it appears that the cases, in principle, are parallel.

The Water Company contends for the right to lay its pipe line across the Kill von Kull in lands under water belonging to this state because it alleges that it is engaged in interstate commerce, which may be conceded (*Kansas City Natural Gas Co. v. Haskell*, 172 Fed. Rep. 545), and relies upon the language of Mr. Justice Bradley, speaking for the circuit court in *Stockton*

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v. *Baltimore and New York Railroad Co.*, 32 Fed. Rep. (at p. 20), where he says:

"We think that the power to regulate commerce between the states extends not only to the control of the navigable waters of the country and the lands under them, for the purpose of navigation, but for the purpose of erecting piers, bridges and all other instrumentalities of commerce, which, in the judgment of congress, may be necessary or expedient."

Conceding to this language all that is claimed for it, it is nevertheless perfectly apparent that nowhere in the tenth section of the River and Harbor act of 1899 is there any intention, expressed or implied, to grant to any person or corporation the right to lay a pipe line under navigable waters in lands belonging to a state or individual, for the purpose of transporting any merchantable commodity whatever. The only intention discoverable is, as already said, the authorization of such a work if it may be lawfully done, and the intention is to authorize it to be done only in such way as to prevent its being any obstruction to navigation. Congress may some day be induced to enact a law under the commerce clause of the federal constitution, which will make a grant of power such as is contended for by the Water Company in this case, but, up to the present time, it has not done so, and the Water Company, without a grant of power, is seeking to prosecute an unlawful work—a work not unlawful in and of itself, but unlawful so far as it appropriates the land and invades the rights of the State of New Jersey, and this by obtaining a mere license from a supervisory power—a license to do the thing desired, efficacious only if and when lawful authority to prosecute the work shall have been obtained.

In this connection it may be observed that the tenth section of the River and Harbor act does not provide that it shall be lawful for the secretary of war to authorize the excavation of land in the channel of any navigable waters of the United States, but only that it shall not be lawful to do the work without the authorization of the secretary, had before beginning the work. The section as worded clearly contemplates that the consent of the secretary shall merely be permissive of the doing of work for which authority already exists.

The force of this view of the situation was clearly seen by the able counsel of the Water Company, who says that it is perfectly clear that were there an act of congress authorizing the laying of the pipes no question could possibly exist of the inability of the State of New Jersey to interfere therewith, and he contends that the same thing is true of the consent of the secretary of war given pursuant to congressional authority, meaning, of course, the consent given under section 10 of the River and Harbor act of 1899. In support of this contention he cites *Cummings v. Chicago*, 188 U. S. 410; *Montgomery v. Portland*, 190 U. S. 89; *Corrigan Transit Co. v. Sanitary District of Chicago*, 137 Fed. Rep. 851, 857; *Maine Water Co. v. Knickerbocker Steam Towing Co.*, 59 Atl. Rep. 953; *Lane v. Smith*, 41 Atl. Rep. 18; *Hagan v. Richmond*, 52 S. E. Rep. 385; 21 Op. Atty. Gen. 41.

*Cummings v. Chicago* was a case involving the question of the right to construct a dock in a navigable river wholly within the State of Illinois under the acts of congress and a permit from the secretary of war. Said Mr. Justice Harlan, speaking for the court (at p. 428):

"That case (*Lake Shore & M. S. R. Co. v. Ohio*, 165 U. S. 366, 368) required a construction of the fifth and seventh sections of the River and Harbor act of September 19th, 1890, upon which sections the plaintiffs in this case partly rely. In that case this court said: 'The contention is that the statute in question manifests the purpose of congress to deprive the several states of all authority to control and regulate any and every structure over all navigable streams, although they be wholly situated within their territory. That full power resides in the states as to the erection of bridges and other works in navigable streams wholly within their jurisdiction, in the absence of the exercise by congress of authority to the contrary, is conclusively determined. \* \* \* The mere delegation to the secretary of the right to determine whether a structure authorized by law has been so built as to impede commerce, and to direct, when reasonably necessary, its modification so as to remove such impediment, does not confer upon that officer power to give original authority to build bridges, nor does it presuppose that congress conceived that it was lodging in the secretary power to that end.

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\* \* \* The mere delegation of power to direct a change in lawful structures so as to cause them not to interfere with commerce cannot be construed as conferring on the officer named the right to determine when and where a bridge may be built.’”

Clearly, then, *Cummings v. Chicago* is a declaration by the supreme court of the United States that the delegation to the secretary of war of the right to determine whether a structure, and, therefore, whether a work such as excavating, will impede commerce, that is to say navigation, does not confer upon that officer power to give original authority for the erection of the structure or the making of the excavation, but only power to consent to such work in the event that it will not interfere with navigation.

*Montgomery v. Portland*, 190 U. S. 89, was a case which involved the question whether the authority given the secretary of war under the River and Harbor act of 1890 was intended to supersede the power of the states to regulate the use of navigable waters entirely within their boundaries, and, largely, upon the authority of *Cummings v. Chicago*, it was decided that it did not. The case, as I view it, has no application to the case at bar.

*Corrigan Transit Co. v. Sanitary District of Chicago*, 187 Fed. Rep. 851, concerned rights claimed under a permission by the secretary of war under the River and Harbor bill of 1899, in waters wholly within the State of Illinois, and does not, in my judgment, touch the real question involved in the case at bar. The court, however, significantly remarked in the conclusion of its opinion (at p. 857):

“With the commerce clause in abeyance, Illinois, as to every being in the world, except future congresses, was absolute sovereign in the premises. The absolute sovereign may change the grade of highways, or may vacate them, may alter the courses and currents of rivers, or may dam or fill them up, and neither alien nor subject traveler and navigator may complain. No one can claim a vested right to have the United States interfere with Illinois, nor can a cause of action arise from want of interference.”

The commerce clause of the constitution of the United States

is in abeyance so far forth as enacting any law authorizing the laying of pipe lines under the navigable waters of the United States in aid of interstate commerce is concerned, and, although some future congress may pass such an act, until it does so the State of New Jersey may at least prevent the appropriation of any of its lands under the navigable waters of the United States by any person or corporation seeking to use such lands in furtherance of its business, although that business may be interstate commerce.

*Maine Water Co. v. Knickerbocker Steam Towage Co.*, 59 Atl. Rep. 953, was an action for damages by a water company against a vessel whose anchor fouled and injured a pipe line upon a structure in the bed of the Kennebec river, upon a showing of negligence by the captain of the vessel. Permission to lay the pipes in the river, which was wholly within the State of Maine, was granted by the legislature of that state, upon plans submitted to the secretary of war and which were recommended by the chief of engineers and authorized by the secretary under section 10 of the act of 1899. The defendant contended that there was no act of congress affirmatively authorizing the laying of the pipe, and the court held that the language of section 10 should be construed to mean that such a work was affirmatively authorized by congress, by implication, when the plans were recommended by the chief of engineers and the work was authorized by the secretary of war; that is to say, that no special act of congress was necessary to authorize the particular work. No question was involved touching the right of congress, either generally or specifically, in terms or by implication, to create any right under section 10 of the act of 1899, which was not in itself entirely lawful and authorized irrespective of federal permission. If congress had passed a special act authorizing the construction of this particular pipe line across the bed of the Kennebec river, instead of authorizing generally such construction upon plans recommended by the chief of engineers and authorized by the secretary of war, the decision would have been the same, namely, that the structure, having the authority of the state and of the federal government, was lawful, and that its injury, through negligence at least, was unlawful and action-

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able. This was a structure in the bed of a navigable river wholly within a single state, and which, but for proper authority, would have been an unlawful obstruction to navigation. No question of interstate navigable waters was involved, and the decision is no authority to the effect that because congress has the authority to legislate concerning interstate navigable waters, and that that legislation, when enacted, is paramount and exclusive, that, therefore, the permission obtained by the water company in this case from the secretary of war needs not to be supplemented by authority from the State of New Jersey. The cases hold, as I understand them, that the power of congress over intra-state streams, when exercised to the full limit, is as paramount and exclusive as when exercised over interstate streams, so the question resolves itself in the last analysis into whether or not the substantive authority which must, I take it, underlie the mere permissive authority, has been obtained, whether state or federal, or exclusively federal. Now, in the case just cited, both authorities were necessary, and both were obtained, and, in the case before me, in my judgment, both authorities are necessary, and only one, namely, the federal permissive authority, has been obtained; *ergo*, the Water Company is without adequate power and authority to prosecute the work in question.

It must be remembered that the pipe line in the above case was laid by permission and authority both of the state (Maine) and United States, and that no question of the extent of the federal authority alone was involved.

What was decided in *Lane v. Smith*, 41 Atl. Rep. 18, is stated in the syllabus, which is as follows:

"The owner of an oyster bed on the tidewater flats, designated to him under the laws of the state, has no cause of action against those who injure it by digging, in a proper manner, a channel through it for the purpose of straightening and improving the harbor channel, the digging being with the approval of the secretary of war and the board of harbor commissioners, under permits from them."

The case is one of those concerning intra-state waters, and contains nothing which is apposite to the case at bar..



*Hagan v. Richmond*, 52 S. E. Rep. 385, was a case in which the supreme court of appeals of Virginia held that section 19 of the River and Harbor act of March 3d, 1899, authorizing the secretary of war to remove obstructions from navigable waters did not operate to prevent the State of Virginia removing such obstructions in cases where the secretary took no action. I can discover nothing in this case which makes for the Water Company upon the question under consideration in the case before me.

21 Op. Atty. Gen. 41, was an opinion by United States Attorney-General Olney. He considered three questions—*first*, whether certain rivers were navigable waters of the United States; *second*, had the secretary of war jurisdiction to grant permission to obstruct such rivers, and *third*, permission to obstruct such rivers having been given, could such permission be revoked under the existing circumstances of the case; and he advised the secretary that the rivers were navigable waters of the United States, that he could grant the permission asked, but that, as a certain company had gone forward and made contracts and spent large sums of money and otherwise materially altered its situation on the faith of the permit granted, that, under such circumstances, the secretary was not then at liberty to revoke the permit. In arriving at these conclusions, and, in the course of his opinion, the learned attorney-general, discussing the proviso about excavating or filling in any navigable water of the United States, as embodied in the seventh section of the act of September 19th, 1890, and which is now a part of section 10 of the act of 1899 (at p. 42), said:

“The main object of congress in the statute is clear. It intended that the navigable waters of the United States should thereafter be under the exclusive control of the United States; that for the future their navigability should be interfered with by bridges, dams or other obstructions only by express permission of the United States, granted through its agent, the secretary of war. That is the plain meaning and operation of the first clause of the amended section 7, already referred to. The same unmistakable purpose is manifested by that clause of section 7 which immediately precedes the proviso, and which de-

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clares that it shall not be lawful hereafter to 'excavate or fill, or in any manner to alter or modify the course, location, condition or capacity of any port, roadstead, haven, harbor of refuge or inclosure within the limits of any breakwater or of the channel of any navigable water of the United States, unless approved and authorized by the secretary of war.' This clause and the first clause of the section cover the whole subject, the one applying to structures in navigable waters of the United States, the other to excavating, filling or other disturbance of such waters. As structures are not to be erected without the permission of the secretary of war, so any excavation, filling, &c., must be approved and authorized by him. Thus the determination of congress that, as a general proposition, the United States shall take and hold jurisdiction over its navigable waters, which should be complete and exclusive of all interference with them from any other quarter, is too plainly and industriously declared to admit of any real question."

There is nothing in these views, as I read them, which makes for the defendant's case. All that is stated by way of advice in the opinion of the able lawyer named is, that "as structures are not to be erected without the permission of the secretary of war, so any excavation, filling, &c., must be approved and authorized by him." Here is no declaration that congress vested in the secretary of war the right and power in and of himself, solely and only to authorize any such work to be done, but only that, authority existing, he might approve and authorize the doing of the work, the only object being, as before stated, that the secretary might and should see to it that navigation of the public waters were not obstructed. To this extent, undoubtedly, the jurisdiction of the United States over its navigable waters is now asserted, and that jurisdiction, to that extent, is exclusive and paramount. That means this: New Jersey may grant the right to build a bridge or lay a pipe line in the Kill von Kull, but without the permission and license of the federal authorities the work cannot be done.

It is contended on behalf of the Water Company that no preliminary injunction should issue because the defendant is not an out and out trespasser, but is proceeding under a claim of

right which should be determined only after full hearing and not upon preliminary application, because no irreparable injury is being done, and reliance is placed upon the following cases, among others: *Attorney-General v. Paterson*, 9 N. J. Eq. (1 Stock.) 624; *Stockton v. North Jersey Street Railway Co.*, 54 N. J. Eq. (9 Dick.) 263; *Raritan Township v. Port Reading Railroad Co.*, 49 N. J. Eq. (4 Dick.) 11, 16.

But this contention is answered by Vice-Chancellor Emery in the two cases of *Township of Franklin v. Nutley Water Co.*, 53 N. J. Eq. (8 Dick.) 601, and *Grey v. Greenville and Hudson Railway Co.*, 59 N. J. Eq. (14 Dick.) 372. In the latter case he said (at p. 386):

"Two important questions therefore remain to be considered—*first*, whether the attorney-general has the right to restrain the construction of the road without evidence of serious actual public injury, and *second*, whether a preliminary injunction should go. As to the first question the cases relating to the right of the attorney-general to intervene in the public interest, which are numerous, show that the distinction is between cases in which a public nuisance, by reason of interference with ordinary public travel, is the sole basis of complaint, and cases where the real injury on which the attorney-general's information is based is an illegal act on the part of a public company in excess of its powers, through which illegal act the public generally is affected.

"In cases of the first class, based on nuisance to travel or passage, it is settled that the attorney-general, in order to obtain the aid of a court of equity, must show a serious public injury, which cannot be remedied in the ordinary tribunals. *Raritan Township v. Port Reading R. R. Co.*, 49 N. J. Eq. (4 Dick.) 11, and cases cited at p. 18.

"In cases of the latter class—excess of public powers affecting the public rights—the rule is settled by many authorities that the attorney-general is justified in interfering without evidence of actual injury to the public. In *Attorney-General v. Shrewsbury Bridge Co.* (Mr. Justice Fry), 21 Ch. Div. 752, all the previous English cases are examined, and this rule declared to be settled. And this case also shows that as to the nature of

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the public interest to be protected, the interference with the public highways or the navigable waters of the state, by a public company in excess of its powers, is a sufficient public interest. This seems to me to be the true rule upon the question now involved. The protection of the state and the public rights against the illegal excess of powers is peculiarly under the charge of the attorney-general, and where this excess affects public rights in highways or navigable waters, the remedy of the state to control the excessive use of a power conferred for public use should not be confined to the uncertain and incomplete remedies by indictment or action after the injury has been completed. For the complete relief and protection to which the attorney-general, as representing the public rights in highways, is entitled, restraint against the excessive use of power is necessary. The uncertainty of protecting the public rights in highways by indictments against nuisances was one reason for the establishment of the doctrine that these public rights should also be protected by ejectment and by injunction, pursued by the municipal bodies vested with control of the highways. \* \* \*

"As to the issuance of a preliminary injunction, such injunction is usually necessary in order to afford the complete relief to which the public are entitled, if, in fact, the interference with the highway is illegal, and preliminary injunctions seem to have been granted and approved in cases of this character where the right to ultimate equitable relief is clear upon the admitted facts. *Easton and Amboy Railroad Co. v. Greenwich Township, supra*. In cases involving the protection of private rights and municipal rights against excessive use of power by public companies, a preliminary injunction is always granted, where necessary for the complete protection to which they are entitled on undisputed facts. *Township of Franklin v. Nutley Water Co., supra*, and cases cited at p. 606. The public rights now asserted against the same kind of injury are entitled to the same protection, and the information does not come within the rule equally well established and enforced, where the rights to be protected and injury complained of involve private property or rights only, that irreparable injury must be shown in order to award a preliminary injunction."

This case (*Grey v. Greenville and Hudson Railway Co.*) was expressly affirmed on this point, but reversed on other grounds. See *Greenville and Hudson Railway Co. v. Grey, Attorney-General*, 62 N. J. Eq. (17 Dick.) 768, 772. See, also, *McCarter v. Pitman, Glassboro and Clayton Gas Co.*, 74 N. J. Eq. (4 Buch.) 255; *State Board of Health v. Diamond Mills Paper Co.*, 63 N. J. Eq. (18 Dick.) 111, 116.

There were several other questions raised and discussed with ability by the distinguished counsel who argued this application before me, but, deeming them of no controlling importance, I have refrained from considering them in this opinion, which has already run into too great length.

The views above expressed lead inevitably to the conclusion that the order to show cause should be made absolute and a preliminary injunction issued in accordance with the prayer of the information. The matter has been sharply litigated, and the informant is entitled to costs.

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THOMAS CUMMINGS et al.

v.

JOHN CUMMINGS et al.

[Decided January 26th, 1910.]

C. C., by the death of his father, became seized of an estate of inheritance in fee in certain lands, and conveyed the same by quitclaim deed to his mother, the widow, for the term of her life only. The deed contained no words of inheritance. C. C. married, and died in the lifetime of his mother, the grantee, who died afterwards.—*Held*, that the fee and the inheritance remained in C. C. during his life, notwithstanding the estate in his mother for her life, and, consequently, he was seized of an estate of inheritance during coverture; therefore, his widow is entitled to dower.

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On bill, answer and stipulation as to facts.

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6 Buch.Cummings v. Cummings.

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*Messrs. Smith & Brady*, for the complainants.

*Mr. J. I. Blair Reiley*, for the defendants.

WALKER, V. C.

'This is a suit for partition in which the property has been sold and the proceeds remain to be distributed. The question before the court is whether the defendant Mary Cummings, widow of Christopher Cummings, is entitled to dower in the estate in the lands which descended to her husband upon the death of his father.

Patrick Cummings, the ancestor, died intestate, seized of the property sold, leaving Bridget Cummings, his widow, and certain children and heirs-at-law, among whom was Christopher Cummings. He joined the other children in executing a quitclaim deed to their mother, the widow, by which they released and quitclaimed unto her the lands in question during the term of her natural life. The *habendum* clause of the deed reads as follows:

"To have and to hold the said premises as before described, with the appurtenances, unto the said party of the second part, to the sole and only proper use, benefit and behoof of the said party of the second part, for and during her natural life, but after her death the same to revert to the grantors. their heirs and assigns forever."

After joining in the deed mentioned, Christopher Cummings married the defendant Mary Cummings, and died in the lifetime of his mother, who has since died. The mother and son both died before the filing of the bill.

By our act relative to dower (*Gen. Stat. p. 1275 § 1*), it is provided:

"That the widow, whether alien or not, of any person dying intestate, or otherwise, shall be endowed, for the term of her natural life, of the one full and equal third part of all lands, tenements and other real estate, whereof her husband, or any other to his use, was seized of an estate of inheritance, at any time during the coverture, to which she shall not have relinquished or released her right of dower, by deed executed and acknowledged in the manner prescribed by law for that purpose."

The question is, Was Christopher Cummings seized of an estate of inheritance in the lands mentioned during the lifetime of his mother, notwithstanding the quitclaim deed to her in which he joined? Upon the death of his father he became seized of an equal undivided one-fourth interest and estate of inheritance in fee in the premises, and it must now be decided whether he divested himself of that inheritance by executing the quitclaim deed. If so, that estate was outstanding in his mother at and during the time of his marriage and at the time of his death. The deed bargains, sells, remises, releases and quitclaims the lands to the grantee, the mother, during the term of her natural life only. The *habendum* is as above set out. There are no words of inheritance in the deed.

Notwithstanding Christopher's execution of the quitclaim deed, I think he was at all times after the death of his father until his own death, seized of a remainder in fee, which is an estate of inheritance, in the lands, and, consequently, was so seized when he married the defendant Mary Cummings after the execution of that deed.

The life estate which passed to the grantee in the quitclaim deed did not convey a fee for want of words of inheritance. Consequently, the fee and the inheritance remained in the grantors. See *Kearney v. Macomb*, 16 N. J. Eq. (1 C. E. Gr.) 189; *Trusdell v. Lehman*, 47 N. J. Eq. (2 Dick.) 218; *Melick v. Pidcock*, 44 N. J. Eq. (17 Stew.) 525; *Chancellor v. Bell*, 45 N. J. Eq. (18 Stew.) 538. A deed to one for life does not grant an estate in fee. *Adams v. Ross*, 30 N. J. Law (1 Vr.) 505. "Fee" originally signified the right of the tenant to the use of the land held of a superior, but this meaning passed into the modern signification of an estate of inheritance. 2 *Bl. Comm.* 106. Inheritance is defined to be a perpetuity in lands to a man and his heirs, and the property which is inherited is called the inheritance. *Bouv. Dict. (Rawle's Revision)* 1037. An estate for life is a freehold estate not of inheritance. *Bouv. Dict. (Rawle's Revision)* 692. All freehold estates are estates of inheritance, except estates for life. *Bouv. Dict. (Rawle's Revision)* 693. An estate for life created by deed is not an estate of inheritance. 11 *Am. & Eng. Encycl. L.* (2d ed.) 377.

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*6 Buch.**Cummings v. Cummings.*

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The estate which the widow acquired by the conveyance from the heirs was an estate for life, and was less than an estate of inheritance.

In my opinion, Christopher Cummings was seized in fee of an estate of inheritance at all times during the coverture, and I will advise that his widow is entitled to dower in that estate.





CASES  
ADJUDGED IN  
THE PREROGATIVE COURT  
OF  
THE STATE OF NEW JERSEY.

OCTOBER TERM, 1909.

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MAHLON PITNEY, ORDINARY.

EDWIN ROBERT WALKER, VICE-ORDINARY.

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JAMES C. BLOREN, proponent-appellant,

v.

CHARLES F. NESLER et al., caveators-respondents.

[Decided September 21st, 1909.]

Evidence examined and held insufficient to show that there had been a publication of a paper writing purporting to be a will, and proposed for probate, in the presence of the witnesses thereto, and hence the paper cannot be probated.

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On appeal from a decree of the Essex county orphans court.

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Bioren v. Nesler.76 Eq.

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*Mr. Arthur R. Denman*, for James C. Bioren.

*Mr. Chandler W. Riker*, for Mary Lulu Bioren.

*Mr. Ralph E. Lum*, for Cornelius and Kate Mandeville.

*Mr. Charles C. Pilgrim*, for Sarah Remer.

WALKER, VICE-ORDINARY.

This is an appeal from a decree refusing probate of a paper writing purporting to be the last will and testament of John D. Nesler, late of the county of Essex, deceased. On the hearing before me application was made on behalf of the proponent and appellant to take further testimony, which was granted. Further testimony was taken, but the evidence, in my judgment, does not strengthen the case of the proponent as made in the court below.

In my opinion, the case under consideration is governed by that of *Manners v. Manners*, 66 Atl. Rep. 583, upon which the decision in the court below was rested. Even if I should not agree with the judge of the orphans court in holding that there was no proof of John D. Nesler's having written his name upon the paper before the witnesses signed, and if I should hold that the testimony of the subscribing witnesses, Mrs. Emma A. Nesler and John R. MacKenzie, was not sufficient to overcome the presumption arising from the attestation clause that the alleged testament was "signed, sealed and delivered in the presence of" the witnesses, still, on the authority of *Manners v. Manners*, I would be obliged to conclude that there had been no publication of the will by the decedent, as required by our statute. I can see no substantial difference between a scrivener announcing to persons called into a room to witness a will, that the person present "had made her will and wanted them to witness it," as in the *Manners Case*, or "this is John D.'s will and you are asked to witness it," which was, in effect, what was said to the witnesses in this case, according to the testimony of Mrs. Nesler. The witness MacKenzie does not remember even that much having been said. The statement was made by Charles L. Nesler, brother of the deceased, who drew the will. The proponent seeks

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6 Buch.Bioren v. Nesler.

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to show assent given by the deceased to the statement of the scrivener by urging that it appears that he smiled and nodded his head after the declaration was made, but the testimony makes it appear that the smile and nod were given in recognition of the appearance of the witness or witnesses when they came into the room, rather than that it was given after the declaration of the scrivener.

It must be conceded, I think, that the testimony of MacKenzie is insufficient to show an execution of the will. It has been held that the testimony of one witness as to the due execution of a will is sufficient to prove the fact of due execution in the presence of two witnesses, although the other one testifies to facts which would show that the statutory requirements had not been complied with, as was the case in *Swain v. Edmonds*, 53 N. J. Eq. (8 Dick.) 142. But there is not proof of due execution by either witness in this case.

The attestation clause in this cause is certainly defective. It is, however, presumptive evidence of the signing, or acknowledgment of the signing by the testator in the presence of the witnesses, unless overcome by proof to the contrary. *Beggan's Case*, 68 N. J. Eq. (2 Robb.) 572. Assuming that there was an acknowledgment of the signature of the decedent to the witnesses, as certified in their imperfect attestation clause, nevertheless, as they did not certify that the will was published in their presence, and as there is no proof of such publication, the paper cannot be probated.

The decree of the court below must be affirmed.

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Bioren v. Nesler.

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76 Eq.

JAMES C. BIOREN, proponent-appellant,

v.

CHARLES F. NESLER et al., caveators-respondents.

[Decided December 17th, 1909.]

1. Under section 197 of the Orphans Court act (*P. L. 1898 p. 789*), which provides that if probate of a will be refused the court may order the costs and expenses of the litigation to be paid by the person propounding the will or out of the estate of the deceased, the court, when ordering the expenses paid out of the estate, is authorized to include counsel fees to both sides as part of such expenses.

2. Fees in such cases may be allowed to counsel representing persons interested in the controversy as legatees or next of kin, who were proper, though not necessary, parties, as well as to counsel representing proponent and caveators, who were necessary parties.

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On application for allowance of counsel fees.

*Mr. Arthur B. Denman*, for the proponent, James C. Bioren.

*Mr. Chandler W. Biker*, for Mary Lulu Bioren, Edith D. Bioren and Edna N. Bioren, beneficiaries under alleged will.

*Mr. Ralph E. Lum*, for the caveators, Cornelius and Kate Mandeville.

*Mr. Charles C. Pilgrim*, for the caveator, Sarah Remer.

*Mr. Frank E. Bradner*, for the caveator, Charles D. Mandeville.

WALKER, VICE-ORDINARY.

John D. Nesler, late of the county of Essex, signed a paper-writing purporting to be his last will and testament, and named his brother, Charles L. Nesler, and James C. Bioren, as execu-

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6 Buch.Bioren v. Nesler.

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tors. Application for probate was made by James C. Bioren, one of the executors named, the other having died. Caveats were filed against the probate of the will by Charles F. Nesler, nephew; Cornelius Mandeville, nephew; Charles D. Mandeville, nephew, and Sarah Remer, who describes herself as one of the next of kin of the decedent. She was mentioned in the will as a legatee, to whom was given \$1,000. Cornelius and Charles D. Mandeville, caveators, are also given \$1,000 each as legatees under the will.

The appearances on the hearing before the Essex county orphans court were: Arthur R. Denman, for proponent, James C. Bioren; Riker & Riker, for Mary L., Edith D. and Edna N. Bioren, children of deceased half-brother of decedent, who was one of the residuary legatees named in the alleged will; Frank E. Bradner, for Charles D. Mandeville, caveator; E. A. & W. T. Day, for Charles F. Nesler, caveator; Lafferty & Pilgrim, for Sarah Remer, caveator; Guild, Lum & Tamblyn, for Cornelius and Kate Mandeville, caveators. On the day of the adjourned hearing the appearances were the same, and, in addition, Jerome T. Congleton was permitted to appear for Emma A. Nesler, a witness.

Additional testimony was taken in the prerogative court at which the appearances were as follows: Arthur R. Denman, for James C. Bioren; Riker & Riker (by Chandler W. Riker), for Mary Lulu Bioren, Edith D. Bioren and Edna N. Bioren; E. A. & W. T. Day (by E. A. Day), for Charles F. Nesler; Lafferty & Pilgrim (by C. C. Pilgrim), for Sarah Remer; Guild, Lum & Tamblyn (by R. E. Lum), for Cornelius and Kate Mandeville.

Emma A. Nesler was formerly Emma A. Schaef, one of the witnesses to the paper-writing purporting to be the will. She subsequently married Charles F. Nesler, decedent's nephew.

After hearing in the orphans court probate of the paper purporting to be the will of John D. Nesler, deceased, was refused, and, on appeal, that decree was upheld in this court, the opinion in that matter being reported *ante* p. 573.

Application was made to the orphans court for the allowance of counsel fees, and Judge Davis filed a memorandum in which

he said that the persons brought into court were the proponent and caveators, which gave the court jurisdiction under *Meyer's Estate*, 71 N. J. Eq. (1 Buch.) 724, and that counsel representing other interests, such as beneficiaries, should not, he thought, be allowed counsel fees. The allowances he made were as follows: Mr. Denman, proctor for proponent, \$150; Mr. Lum, proctor for caveator, \$150; Mr. Pilgrim, proctor for caveator, \$150; Mr. Bradner, he stated, asked no counsel fee, and he also stated that Mr. Day and Mr. Riker, representing beneficiaries, were not entitled to any compensation out of the estate. Mr. Day appears to have represented a caveator. No appeal was taken from that part of the decree which made allowances.

Application is now made to this court for allowances as follows: Mr. Denman, \$500; Mr. Riker, \$500; Mr. Guild, \$250, and Mr. Lafferty, \$250.

In *Meyer's Estate*, *supra*, the court of errors and appeals observed that the statutory direction to the surrogate to issue citations to all persons concerned when a caveat is put in against proving a will, was possible to be construed to include all persons having an interest in the admission of a will to probate on the one hand, and on the other only to the parties raising the controversy, but held that the construction which limits the persons concerned to the parties raising the controversy is entirely practicable, and that it is reasonable to suppose that only those persons who had made themselves parties to the contention were intended.

The decision then appears to be that in a controversy respecting the probate of a will the surrogate is only required to issue citations to the proponent and caveators in order to vest the orphans court with complete jurisdiction over the controversy. In other words, as I understand it, the decision is to the effect that the proponent and caveators are the only necessary parties to the controversy. If this view be correct, then it may, with propriety, be held that other persons equally interested in the estate as legatees or next of kin may become concerned in the controversy by appearing and taking part in it for the protection of their rights and interests, and thus become proper, although they are not necessary, parties to the controversy, and

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6 Buch.Bloren v. Nesler.

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this is undoubtedly the established practice. If this be so, it is lawful to allow fees to counsel representing these proper parties as well as those who represent necessary parties. In other words, the controversy being inaugurated, all parties who lawfully participate in the controversy have an equal standing before the court, and an equal claim to its consideration.

Counsel for one of the caveators and respondents objects to the payment of counsel fees, contending that section 197 of the Orphans Court act (*P. L. 1898 p. 789*), which provides for the payment of costs and expenses in certain cases out of the estate, does not authorize the inclusion of counsel fees as part of the expenses. He concedes that it has been the practice to allow counsel fees as appears from numerous reported cases, but claims that the allowance cannot be justified under the statute. He doubtless refers to the line of cases in which allowances have been made without question. But he is mistaken in asserting that there is no justification for such allowances. On the contrary, the practice has the express sanction of this court and of the court of errors and appeals. *Hollinger v. Syms*, 37 N. J. Eq. (10 Stew.) 221; *S. C.*, 37 N. J. Eq. (10 Stew.) 628; *Matter of Lucy H. Eddy*, 33 N. J. Eq. (6 Stew.) 574, 578.

*Hollinger v. Syms*, in this court, was an appeal from the orphans court of Hudson county. The grounds of appeal were that a will and codicil had been erroneously admitted to probate, and the caveator denied an award of counsel fees out of the estate. Chancellor Runyon, sitting as ordinary (at p. 238), said:

"The orphans court, by decree, expressly and properly adjudged that he (caveator) had reasonable cause for contesting the validity of the will and codicil, and therefore awarded him payment of his costs and expenses out of the estate. On the same ground he was equally entitled to payment of his reasonable counsel fees."

The learned ordinary then went on to modify the decree and allow a considerable counsel fee in the court below, together with the costs of the appeal, but no counsel fee in this court. He could, of course, have allowed a counsel fee in this court, as is often done. This case (*Hollinger v. Syms*) was carried to the



court of errors and appeals, and there affirmed for the reasons given by the ordinary. *Hollinger v. Syms, supra.*

In *Eddy's Case*, 32 N. J. Eq. (5 Stew.) 701, 708, a will and codicil were admitted to probate in this court, with denial of costs to the caveator. On appeal the court of errors and appeals held that sufficient reason existed for opposing probate and that the caveators were entitled to their costs and reasonable counsel fees. Chief-Justice Beasley, speaking for that court (at p. 578), said:

"But, upon a careful consideration of the facts of the case, I have been led to the conclusion that there should be a modification of the decree, so far as to allow costs and counsel fees to the contestants."

The section of the Orphans Court act under which costs and expenses may be allowed in these controversies is identical with that which was in force when *Hollinger v. Syms* and *Eddy's Case* were decided. See *Gen. Stat. p. 2397 § 177*. By that section (*P. L. 1898 p. 789 § 197*) it is provided that if probate be refused the court may order the costs and expenses to be paid by the person or persons propounding the will or out of the estate, but if probate be granted the court shall order the party or parties contesting to pay the costs and expenses unless it shall appear that the person or persons contesting had reasonable cause, in which case the court may order the costs and expenses as well on the part of such contestant or contestants as on the part of the person or persons propounding such will, to be paid out of the estate.

Any person who would be benefited by the probate of a will may present it or require it to be presented for probate. *Meyer's Case*, 71 N. J. Eq. (1 Buch.) 138, 140. And the court of errors and appeals in that case (at p. 140) also says:

"Thus, anyone interested in promoting or preventing the probate of a proposed will is entitled to make himself a party to the proceedings having such an end in view."

I understand this to mean that anyone so interested may obtain the status of a party by voluntary appearance, and, having once appeared, is entitled to all the rights that anyone required to be made a party and involuntarily brought in would

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6 Buch.Bloren v. Nesler.

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have. Persons propounding the will or contesting it, as I understand it, are those who urge before the court either its probate or its rejection, and I understand, too, that such persons are, by the practice which obtains quite universally, I think, those who are included in awards of costs and counsel fees, especially when ordered to be paid out of decedents' estates.

These views are opposed to those expressed by Judge Davis in his memorandum in the orphans court, but, as his order was not appealed from, it will not be reversed.

As already remarked, Mr. Denman, representing proponent, was allowed \$150 in the court below, and Messrs. Guild, Lum & Tamblyn, and Messrs. Lafferty & Pilgrim, representing caveators, were each allowed the same amount. I will allow Mr. Denman \$100 for his services in this court, and to Mr. Riker, who took the laboring oar here, the same amount that Mr. Denman will receive for his services in both courts—that is, \$250, and to Mr. Lum and Mr. Pilgrim each an additional \$100. This makes a total allowance to counsel for the proponents of \$500, and to counsel for contestants \$500, or \$1,000 in all for counsel fees out of the estate, which is ample to bear the charge. And this makes the fees to each side equal, which is quite usual. Of course, the allowance could be greater, but, as only a single question was involved, namely, the question of due publication of the alleged testament, and as but few witnesses were examined, there is, in my opinion, no justification for larger allowances. Costs out of the estate will also be awarded to the proponent and caveators in this court.



CASES ADJUDGED

IN THE

COURT OF ERRORS AND APPEALS

OF THE

STATE OF NEW JERSEY

ON APPEAL FROM THE COURT OF CHANCERY,  
AND THE PREROGATIVE COURT.

NOVEMBER TERM, 1909.

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JANE FORTESQUE et al., respondents,

v.

WILLIAM H. CARROLL, appellant.

[Submitted December 15th, 1909. Decided February 28th, 1910.]

1. Courts of equity do not aid one man to restrict another in the uses to which he may lawfully put his property unless the right to such aid is clear.

2. Whether or not a covenant that "not more than one building shall be erected upon a single lot" is violated by the erection of a structure whose exterior walls, foundation and roof constitute it one building but whose interior arrangement and entrances show that it is to constitute two residences, is not so clear that a court of equity will aid in its enforcement.

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On appeal from a decree of the court of chancery advised by Vice-Chancellor Leaming, whose opinion is reported in 75 *Atl. Rep.* 973.

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Fortesque v. Carroll.

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76 Eq

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*Messrs. Bourgeois & Sooy, for the appellant.*

*Mr. James H. Hayes and Mr. Harry Wootton, for the respondents.*

The opinion of the court was delivered by

GARRISON, J.

This is an injunction bill to enforce a restrictive covenant in these words: "Not more than one building shall be erected on a single lot as mapped on plan."

We agree with the learned vice-chancellor that the respondents may enforce this covenant if it is being violated. The question therefore is whether or not the appellant was erecting more than one building on his lot. This is a question of fact. The structure in controversy as regards its exterior walls, foundation and roof was one building. while the space thus included might be arranged to serve as one residence or as two residences. Because the building was arranged to serve as two residences the learned vice-chancellor held that it was two buildings within the language of the covenant, although, of course, admitting that but for such arrangement it would have been one building; and presumably, upon the removal of such arrangements, would again become one building. An interpretation that leaves the matter in this ambulatory state is strongly suggestive of error, which in the present case we think consisted in the substitution for the words "one building" of the words "one residence," or if not the substitution then the addition of such words so that the covenant is made to read "not more than one building to be occupied as one residence." The harm done to the appellant by giving to the words "one building" the added force of "one residence" is not only that the covenant contains the former and not the latter, but also that the two terms, referring, as they do, to different things, and resting upon different considerations, set up two totally distinct criteria by which to determine whether or not the restriction has been violated. The word "building" connotes normally matters of construction, whereas the word "residence" directs attention solely to a use or mode of occu-

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6 Buch.Fortesque v. Carroll.

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pancy to which a building may be put. It is one thing, therefore, to restrict the uses to which a lot may be put to the construction of one building on it, but to go further and restrict the use to which such building may be put is another and quite a different proposition; the first is clear and satisfies the express language of the restriction, but the implied restriction upon such express restriction is not clear; on the contrary, such implication is well nigh inadmissible because of what is expressed.

For prescriptions pertaining to buildings in the matter of construction such as their cost, size, height, location or number are so essentially distinct from restrictions that prescribe the use or mode of occupancy of a building that the employment of the former in a restrictive covenant, instead of carrying with it the implication that the latter was meant, tends strongly to forbid such implication; at all events an alleged violation of an express restriction as to construction should not be tested by a criterion derived solely from an implied restriction as to mode of occupancy. A covenantee may at his will impose restrictions that in terms relate solely to matters of construction, or that in terms relate solely to matters of use, or that in terms relate to and cover both, but if he select one and omit the other he does not prove a breach of the restriction that he has put in the covenant by showing a violation of the one that he has left out of it.

By the failure to observe this distinction between construction and use, the court below was misled into a finding of fact by which a structure that, on one day was either one building or two, would the next day become two buildings, to become one building again on the third day, according as its adjustment to particular modes of occupancy might be varied; whereas, had the criterion applied been that suggested by the words of the covenant itself, viz., one of construction, the erection, if one building as a matter of construction, would have remained so, regardless of its intended occupancy, until some change of construction was made that resulted in the erection of two buildings where previously but one had been constructed. If the view thus expressed does no more than render it doubtful whether the appellant had violated the restriction in his deed the result would be a reversal of the decree of the court below. For it is well

settled that in cases where the right of a complainant to relief by the enforcement of a restrictive covenant is doubtful "to doubt is to deny." This is the established rule not only because restrictions of the lawful uses of property are against common right but also because restrictions, in the framing of which a subsequent purchaser has had no voice, ought to be so clear that by the acceptance of the deed that declares them he may reasonably be deemed to have understood and acceded to them. The rule is sometimes stated that such restrictions are not favored by the law. I do not see that anything is gained by this personification of the law and the ascription to it of personal preferences; a more practical statement would be that courts of equity do not aid one man to restrict another in the uses to which he may put his land unless the right to such aid is clear. In a recent case Vice-Chancellor Howell correctly stated the rule thus: "It must be conceded that restrictive covenants must not be vague or uncertain; that the complainant's right to insist upon the covenant and to invoke the injunctive power of the court must be clear and satisfactory." *Newberry v. Barkalow*, 75 N. J. Eq. (5 Buch.) 128.

It goes without saying that the learned vice-chancellor before whom the present case was tried recognized the existence of this rule, which he thus states in his conclusions: "The covenant must be sufficiently clear in itself to justify the court in saying that there can be little doubt as to its meaning," adding his belief "that there can be little doubt but that it forbids exactly what is being done in this case by the defendant."

The doubt that was deemed negligible by the vice-chancellor was the doubt that survived the assumption that by "one building" the covenant meant "one residence;" but it must be conceded that by "one building" the covenant may have meant just what it said, viz., "one building," in which case the doubt engendered as to whether the structure was not in fact one building could no longer be treated as negligible, having, as it has, in its support the express language of the covenant, and requiring for its overthrow the substitution of language of a totally different import that by fair implication was intentionally omitted.

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6 Buch.N. J. Title Guarantee & Trust Co. v. Rector.

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The meaning that has to be placed upon the words "one building" in order to support the result reached in the court below is, to say the least, doubtful, in that it is not clear that more than one residence on a lot was what was prescribed. To say this is to reverse the decree brought up by this appeal.

A *remititur* to that effect may be entered to the end that the complainant's bill may be dismissed.

*For affirmance*—REED, TRENCHARD, MINTURN, BOGERT, VROOM—5.

*For reversal*—THE CHIEF-JUSTICE, GARRISON, SWAYZE, PARKER, BERGEN, VOORHEES, VREDENBURGH, GRAY, DILL, CONGDON—10.

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NEW JERSEY TITLE GUARANTEE AND TRUST COMPANY, complainant-appellant,

v.

JOSEPH M. RECTOR et al., defendants-respondents.

[Submitted December 2d. 1909. Decided February 28th, 1910.]

Under "An act concerning warehouse receipts and to make uniform the law relating thereto" (*P. L. 1907 p. 341*), a receipt or memorandum given by a warehouseman to his bailor which shows that the property described therein was received from the bailor, by the warehouseman, for safe-keeping, in the ordinary course of his business, is a sufficient warehouseman's receipt to entitle him to require his bailor and an adverse claimant to interplead and settle their respective rights to the property, although it may not embrace all of the terms set out in section 2 of the act.

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On appeal from an order of the court of chancery advised by Vice-Chancellor Leaming, whose opinion is reported in 75 *N. J. Eq.* (5 Buch.) 423.



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*Messrs. Collins & Corbin*, for the appellant.

*Mr. Marshall W. Van Winkle*, for the respondents.

The opinion of the court was delivered by

BERGEN, J.

The bill of complaint in this cause sets out that the complainant was engaged in the business of warehousing valuable goods for hire, and that Joseph M. Rector deposited with it a box, for which a receipt was given to the depositor; that subsequently Emily M. Rector, claiming to be the owner, notified the complainant not to deliver the box or its contents to Joseph M. Rector, as it belonged to her, and demanded delivery; that the depositor also demanded delivery to him, and that each claimant threatened to bring a suit against complainant to recover the contents of the box. The prayer is that the claimants be required to interplead concerning the ownership of the property. A general demurrer for want of equity was interposed by Joseph M. Rector, which the vice-chancellor sustained, and to review that conclusion this appeal was taken.

The complainant rests its right to relief upon a statute of this state entitled "An act concerning warehouse receipts and to make uniform the law relating thereto" (*P. L. 1907 p. 341*), section 17 of which provides that if more than one person claim the title or possession of the goods deposited with a warehouseman he may, either as a defence against non-delivery, or in an original suit, require all known claimants to interplead. Section 18 enacts that if someone other than the depositor, or person claiming under him, has a claim to the title or possession of the goods, and the warehouseman had information thereof, he shall be excused from liability for refusing to deliver the goods, either to the depositor or to the adverse claimant, until he has had a reasonable time to ascertain the validity of the adverse claim, or to bring legal proceedings to compel all claimants to interplead. Therefore, if complainant received the goods from the depositor, as a warehouseman, in compliance with the terms of

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the act above mentioned, it is entitled, under section 17, to "require all known claimants to interplead," and this the vice-chancellor held, but he sustained the demurrer upon the ground that the receipt issued by complainant to the depositor did not comply with section 2 of the act. So much of the receipt executed by the complainant and delivered to Joseph M. Rector, when the goods were deposited, as is pertinent to the issue raised, reads as follows:

"CERTIFICATE OF RECEIPT FOR VALUABLES.

"No. 1749.

"Received of Dr. J. M. Rector of Jersey City, N. J. to be placed in one of the storage vaults of the Company for safe keeping one (1) Package, contents unknown to the Company, described and valued by said J. M. Rector as follows, viz.:

"Silverware .....\$500.

"Total valuation Five Hundred Dollars, on which.....  
Dollars have been paid for.....storage up to.....

"Upon re-delivery of the above mentioned package to the depositor the liability of the Company will cease without reference to the contents thereof."

The determination of the vice-chancellor, as expressed in his opinion, was "that until a bailee of goods has issued a warehouse receipt in conformity to the requirements of the second section of the act, he has not brought himself within the privilege which the legislature has intended to confer by sections 17 and 18." The specific requirements which the vice-chancellor finds to be absent are, "a statement whether the goods received will be delivered to the bearer or to a specified person or his order," and also "the rate of storage charges."

We think that the clause in the receipt which reads, "upon re-delivery of the above-mentioned package to the depositor, the liability of the company will cease without reference to the contents thereof," justifies the inference that the goods will be delivered to a specified person, that is, to the depositor, for a "re-delivery of the above-mentioned package to the depositor," can only mean that the goods were to be delivered to him, and not to bearer, or to the order of a specified person, the provision in the statute being "a statement whether the goods received will be delivered to the bearer. to a specified person, or to a specified

person or his order." The receipt does not provide for delivery to bearer, or to the order of any specified person, but intends a redelivery of the package to the depositor. Another term to be embraced in the receipt, as set out in section 2, is, "the rate of storage charges," which was not complied with in this case, for the amount of the storage charges was omitted. But according to the view we take of this statute the two matters which seem to have influenced the vice-chancellor are not of importance, for we think that the construction of the statute by the vice-chancellor is too narrow a one, and its application too limited. The statute is of a remedial character, and one of the purposes manifestly intended was the modification of that harsh, and in many cases inequitable, rule which prevented a warehouseman from calling upon his bailor to interplead when the bailor's title was assailed by an adverse claimant. The section upon which the vice-chancellor relies does set forth what a receipt shall embrace, but in its concluding paragraph declares that a warehouseman shall be liable to any person injured for all damages caused by the omission, from a *negotiable* receipt, of any of the terms therein enumerated. It does not declare the receipt void, but prescribes a penalty, if, being negotiable, any person is injured because of the omission of any of such terms, and appears to recognize receipts from which some of the terms set out in the act are omitted. If we should adopt the view of the vice-chancellor, a negotiable receipt, even in the hands of a third party, would not be the receipt of a warehouseman, under the act, if a single term was omitted, although the law makes the warehouseman liable on the receipt for all damages resulting from any such omission.

The receipt in this case is not a negotiable one, and it is not pretended that any person has suffered any damage because of the alleged omission of two of the terms named in the act, but the warehouseman in such case is liable under section 7 to any person purchasing a receipt, supposing it to be negotiable, if the warehouseman neglects to mark it "non-negotiable." In each case the terms recited in the act are rather for the benefit of third persons or innocent holders, than the original parties,

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and in either case omissions do not destroy the character of the writing as a warehouseman's receipt.

Section 7 of the act, in referring to non-negotiable receipts, imposes upon the warehouseman the duty of plainly placing upon its face the words "not negotiable," if he would escape the same liability to the holder of such a receipt who had purchased it for value, supposing it to be negotiable, as he would have incurred had the receipt been negotiable, and then provides that the section shall not apply to letters, memoranda or written acknowledgments of an informal character, plainly recognizing receipts or written acknowledgments differing from those described in section 2.

We are of opinion that a receipt or memorandum given by a warehouseman to his bailor, which shows that the property described therein was received from the bailor, by the warehouseman, for safe-keeping, in the ordinary course of his business, is a sufficient warehouseman's receipt to entitle him, under the statute, to require his bailor and an adverse claimant to interplead and settle their respective rights to the property, although the receipt may not embrace all of the terms set out in section 2 of the act. This result makes it unnecessary to pass upon the question raised by the appellant here whether, without regard to the act of 1907, the bill can be sustained, and no opinion is expressed on that point.

The suggestion made by the respondent that the complainant is not a warehouseman, is sufficiently answered by reference to the statute and the bill of complaint. Section 58 declares "warehouseman" to mean a person lawfully engaged in the business of storing goods for profit, and the bill of complaint alleges that the complainant is conducting the business of running safe deposit vaults, and warehousing valuable goods and chattels for hire, which sufficiently describes "warehouseman" as defined by the act, and on demurrer the statements contained in the bill of complaint are assumed to be true.

The result is that the order sustaining the demurrer filed by Joseph M. Rector, one of the defendants, should be reversed, with costs, and it is so ordered.

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*For affirmance*—None.

*For reversal*—THE CHIEF-JUSTICE, GARRISON, SWAYZE, REED, TRENCHARD, PARKER, BERGEN, VOORHEES, MINTURN, BOGERT, VREDENBURGH, VROOM, GRAY, CONGDON—14.

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WALTER M. JACKSON, complainant-respondent,

v.

HORACE E. HOOPER, HARRIS B. BURROWS, CHARLES C. WHINERY and FRANKLIN H. HOOPER, defendants-appellants.

[Argued November 30th, 1909. Decided February 28th, 1910.]

1. Two individuals purchased all the stock of a business corporation under an agreement that they should be partners, having equal voice and equal control in the management and business of the company; that the corporation should be treated as a mere agency in carrying out the copartnership agreement; that the directors, other than the two parties, should be mere nominal directors; that corporate forms should be ignored and the business transacted and treated as a partnership business. This having been done for a time the parties disagreed.—*Held*, that a court of equity has no power to take the corporate property into its control, as upon the dissolution of a copartnership, but that the rights of the parties must be administered as shareholders in the corporation, not as partners.

2. An agreement between shareholders controlling the stock of the corporation, that certain directors shall act as nominal or dummy directors, subservient to the will of the parties, is illegal and cannot be enforced in a court of equity.

3. An injunction against the persons who compose the board of directors of a corporation enjoining them individually in respect to corporate affairs, is an injunction against the corporation.

4. A court of equity has no jurisdiction to regulate the management of the internal affairs of a corporation organized under foreign laws, through the medium of an injunction issued either against the members of the board of directors as individuals, who are parties to the action, or against the corporation directly.

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On appeal from an order of the court of chancery advised by Vice-Chancellor Howell, whose opinion is reported *ante p. 185*.

*Mr. Sherman L. Whipple* (of the Massachusetts bar), *Mr. Richard V. Lindabury* and *Mr. Sherrerd Depue*, for the complainant-respondent.

*Mr. Henry W. Taft* (of the New York bar), *Mr. Robert H. McCarter*, *Mr. Jacob Newman* and *Mr. Benjamin V. Becker* (of the Illinois bar), and *Mr. Henry Wollman* (of the New York bar), for the defendants-appellants.

The opinion of the court was delivered by

DILL, J.

The bill and injunction in this case rest upon the theory that the complainant, who united with the defendant Horace E. Hooper in acquiring in equal shares all the stock of two foreign corporations, pursuant to an agreement claimed to create a partnership or joint adventure, is entitled to treat the two corporations, organized under foreign laws, as mere agencies or instrumentalities in the conduct of the joint business and to subject not only the stock owned by both parties, but all the corporate property to the control of the court of chancery according to the principles of the law of partnership.

The vice-chancellor held that "the complainant and the defendant Horace E. Hooper were engaged as principals in a joint undertaking;" that "the English and Illinois corporations were respectively agencies by which they accomplished their results," and that, as the rules governing partnerships applied, a preliminary injunction should be granted. From the injunction order the defendants appeal.

We are constrained to differ radically from the learned vice-chancellor in his views of the power and scope of the court of chancery, in dealing with corporate property, and we reach the conclusion that neither the bill nor the injunction can be sustained.

As we place our decision on broad grounds, which are disposi-

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tive of the whole case, we treat the allegations of fact in the bill as favorably as upon a demurrer and without reference to the denials contained in the answer and affidavits submitted by the defendants.

The record in this case is voluminous, covering over six hundred pages, but the salient facts are as follows:

Prior to 1900 the complainant and the defendant Horace E. Hooper had been associated in London, England, in the business of publishing and selling subscription books, "through the agency of a company known as 'The Clarke Company, Ltd.,' " an English corporation. In 1900 they acquired in equal portions all the stock of that company under an agreement that

"upon the acquisition of the Clarke interests and so long as they might be associated together in business, their general policy in respect of their joint undertakings should be determined by mutual assent, each to have and exercise the authority and control of equal partners."

In 1902, to avoid the English tax law, the business transacted in England was separated from that conducted elsewhere. The Clarke Company, Ltd., was dissolved, and its assets and all the business carried on by the parties in interest were conveyed to two corporations, one "Hooper & Jackson, Ltd.," of England, to carry on the business in the United Kingdom; the other, a New York corporation, "The Encyclopædia Britannica Company," to operate elsewhere. The stock and securities of these corporations were issued to the two parties equally in payment for the property thus acquired by the corporations from these parties. The bill alleges that both these corporations were "intended to become merely instrumentalities or agencies for carrying out certain partnership purposes," and to be subject to the original agreement.

In 1903, for reasons of their own, the parties dissolved the New York corporation and transferred its assets to an Illinois corporation of the same name and under the same general understanding that the business should be carried on as a partnership, with five directors, of whom the complainant and Hooper were two, the other three being "nominal" directors.

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As to the "nominal" directors the bill alleges in the plainest language that they were mere dummies, both in the New York company and its successor, the Illinois corporation, and says:

"It was clearly understood that the election of particular persons to these three positions was not intended to, and did not, confer upon them any authority or control or the management of the business of the plaintiff and Hooper, but that at all times such persons, employes or others, should have no right or authority whatever in corporate matters other than to vote as directed by Hooper and the plaintiff acting jointly."

From 1902 to 1908 the business in which the companies were engaged, including the publication of the Encyclopædia Britannica, extended all over the civilized world and ran up into millions, the accounts receivable alone, at the time of the filing of the bill, amounting to over \$2,000,000. During all this time, according to the bill, the business was conducted in the names of corporations but always in accordance with the original agreement as to equal ownership, interest, authority and control, the three nominal directors being mere employes and automatons of the parties, and the existence of the corporations being always disregarded "except as agencies and instrumentalities created by them for carrying out certain of their co-partnership purposes."

In 1908 the complainant and Hooper quarreled as to the business policy, and their differences having become irreconcilable the theretofore dummy directors voted with Hooper and against the complainant. This, as the bill puts it, constituted a breach of the so-called partnership agreement that Jackson and Hooper should have equal control and equal voice in the management of the companies and that the other three directors should be and remain dummies.

The charge of the bill is that Hooper and the three nominal directors passed corporate resolutions and amended by-laws which changed the complainant's alleged partnership control, contrary to his wish, or, in other words, that the three dummy directors, assisting Hooper, practically ousted the complainant from his alleged partnership control over the corporation. This was done by the passage of resolutions, as, for example, requiring checks to be signed by two officers, thus putting it out of the



complainant's control to draw on the assets of the company, as a partner would, whenever he saw fit and by his own check.

The relief asked for is that the court appoint a receiver of all the assets and joint property of the complainant and the defendant Horace E. Hooper, including their stock in the two corporations, such receiver to have the usual powers of receivers of assets of a copartnership; that the defendants—directors of the Illinois corporation—be restrained from selling any of the assets of the copartnership, including such stock, or from voting upon the same; from withdrawing from the business heretofore conducted by Hooper and the complainant or from any one of their bank accounts, in whatever name the same may be, any money otherwise than in the ordinary course of business; that defendants be restrained from preventing complainant from participating, as prior to 1908, in the conduct of the business carried on by the complainant and Hooper, whether the said business is carried on in the name of themselves or their companies; that the defendants be enjoined from causing any assets of the copartnership to be transferred to or by the Illinois corporation, irrespective of the name in which such assets stand, from selling either the English or American rights of the *Encyclopædia Britannica*, eleventh edition, or disposing, except in the ordinary course of business, of any other assets of the copartnership, whether they stand in individual or corporate names; that the copartnership be dissolved, that an account be taken and that the assets of the copartnership be sold and distributed between the complainant and Horace E. Hooper.

After a careful review of the facts the vice-chancellor concluded that while the complainant had been unable to establish the existence of a copartnership between himself and Horace E. Hooper, he did prove that "the series of transactions set out in the bill \* \* \* belonged to that class of transactions which are known by the name of joint adventures" and are subject to the same rules of law which apply to partnerships. He held that the complainant was entitled to a preliminary "injunction broad enough to hold the *status quo* and yet so limited as not to interfere with the orderly, regular and usual conduct of the business."

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He granted an injunction which, although reciting that nothing therein should "interfere or be deemed to interfere with the integrity or autonomy of the two corporations mentioned in the bill of complaint, to wit, Hooper and Jackson, Ltd., an English corporation, and the Encyclopædia Britannica Company, an Illinois corporation, or either of them, or to interfere with the business or property of either of said corporations, *except as herein specifically stated*," forthwith proceeds to enjoin the defendants, who, with the complainant, constitute the entire boards of directors of the English and Illinois corporations, from transferring any of the shares of stock therein, from withdrawing from the business of the complainant and Hooper or "from any one of the bank accounts of the said business, in whatever name the same may be, any money or moneys for the private or personal use of the defendants \* \* \* or otherwise than in the payment in the ordinary course of business," except that such defendants as are employees may receive their respective salaries. He further issued a mandatory injunction that the complainant and the defendant Horace E. Hooper may withdraw such sums for their private use as they may mutually agree upon, or, in absence of an agreement between them, that each may draw \$5,000 per month; that either complainant or said Hooper shall have the right to sign checks for such amount, except that any debt of the business may be paid out of the funds thereof in whatever name standing. The order further enjoins the defendants from interfering with the complainant in his entrance and exit to and from any office where the business is carried on or in his examination of its books and accounts, and proceeds to enjoin the defendants from transferring or causing to be transferred any of the assets of the English corporation to the Illinois corporation, or *vice versa*, except in the regular course of business, and from "selling or causing to be sold" the rights of the Encyclopædia Britannica Company in the eleventh edition, or "any assets of the said business carried on by the complainant and the defendant Horace E. Hooper, in whosoever name the same may stand."

In our view of the case the fundamental question is not whether the complainant has established the agreement alleged, but

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whether, assuming that he has, the court has the power to enforce it.

The first question to be discussed is whether, assuming the fact of the partnership or joint adventure as alleged to be satisfactorily proven, the complainant and the defendant, after the organization of the foreign corporations, were, as matter of law, partners or merely shareholders.

It is conceded that the corporations in question were legally organized, existing and doing business under foreign laws. It is not disputed that when the corporations were formed and the stock and bond interests acquired the parties retained no legal title to the property or business transferred. It is not questioned that the forms of law were complied with by the election of directors and officers and the prosecution of the corporate business. Indeed, the record abounds with evidence establishing the fact that the corporations as such, through their officers and agents, made contracts and in general transacted the business for which they were organized. Thus, from 1904 to 1909, promissory notes for over a million dollars were executed by and in the name of the Illinois corporation.

It is true that directors' and stockholders' meetings were seldom held and that the financial and other business affairs of the corporation were often informally and loosely conducted, yet, on the whole, the operations of the companies were the same as those of innumerable other so-called "close corporations" in which all the stock is held by a few persons who are as one in the conduct and policy of corporate action.

It is claimed, however, that these owners of all the stock were really copartners, doing business in corporate form for their own convenience, and that a court of equity has the power to control the property and affairs of the companies even to the extent of eliminating the corporate functions and powers as mere incidents and wholly disregarding the substantive law governing the creation, supervision and dissolution of corporations. We cannot subscribe to any such doctrine.

An agreement or course of dealing by which corporations are organized for the purpose of using them merely as agencies or instrumentalities, or forms in the conduct of a copartnership

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or joint business, and by the consent of the parties in interest to be independent of statutory control, cannot be recognized, enforced or perpetuated by the court of chancery in this state.

It is fundamental that, no matter how the shares of stock are held, the corporation itself is an entity wholly separate and distinct from the individuals who compose and control it.

The complainant and the defendant, though owning the entire capital stock of the two corporations, are not, as expressed by Chief-Justice Waite in the leading case of *Pullman Palace Car Co. v. Missouri Pacific Railway Co.*, 115 U. S. 587, "the corporation, in the sense of that term as applied to the management of the corporate business or the control of the corporate property."

The law never contemplated that persons engaged in business as partners may incorporate, with intent to obtain the advantages and immunities of a corporate form and then, Proteus-like, become at will a copartnership or a corporation, as the exigencies or purposes of their joint enterprise may from time to time require.

The policy of the law is to the contrary. If the parties have the rights of partners they have the duties and liabilities imposed by law and are responsible *in solido* to all creditors.

If they adopt the corporate form, with the corporate shield extended over them to protect them against personal liability, they cease to be partners and have only the rights, duties and obligations of stockholders. They cannot be partners *inter sese* and a corporation as to the rest of the world.

Furthermore, upon grounds of public policy, the doctrine contended for cannot be tolerated as it renders nugatory and void the authority of the legislature—a co-ordinate branch of the government—established by the constitution in respect to the creation, supervision and winding up of corporations.

These views are amply sustained by abundant authority.

"A corporation is a legal person just as much as an individual," said the court in *Sheffield, &c., Building Society*, 22 Q. B. D. 476. And in *Society v. Abbott*, 2 Beav. 567, Lord Langdale, master of rolls, held that, as in this case, great confusion arises by failure to distinguish the body corporate from the indi-

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viduals who constitute, "not the corporation, but all the members of the corporation."

The doctrine repeatedly urged by the complainant and adopted by the vice-chancellor, viz., that "the English and Illinois corporations were, respectively, agencies by which they (Jackson and Hooper) accomplished their results," was expressly repudiated by the house of lords in *Salomon v. Salomon, Limited*, 45 *Week. Rep.* 193; *L. R. App. Cas.* (1897) 22, where Lord Halsbury met this argument, saying:

"I will, for the sake of argument, assume the proposition that the court of appeal lays down, that the formation of the company was a mere scheme to enable Salomon to carry on business in the name of the company. \* \* \* Either the limited company was a legal entity or it was not. If it was, the business belonged to it and not to Salomon. If it was not, there was no person and no thing to be an agent at all, and it is impossible to say at the same time that there is and there is not a company."

And Lord Macnaghten thus concurred:

"The company is at law a different person altogether from the subscribers to the memorandum, and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them."

Two years earlier Lord-Justice Lindley asserted the same rule in the case of *Newman & Co.* (1895), 1 *Ch.* 674, 685:

"It is true that this company was a small one, and is what is called a private company, but its corporate capacity cannot be ignored. Those who form such companies obtain great advantages, but accompanied by some disadvantages. \* \* \* An incorporated company's assets are its property and not the property of the shareholders for the time being. \* \* \* The court is bound to recognize the company as incorporated, and to give effect to all the consequences of such incorporation."

The same theory and the same argument urged upon this court by the complainant's counsel were presented to the court of last resort of Massachusetts more than seventy-five years ago, and in a case strikingly similar to and on all fours with the case

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at bar. That court characterized the argument as ingenious but declared the theory fallacious and the conclusions unsound. *Russell v. M'Lellan*, 14 Pick. 63.

The Massachusetts court said of the bill in that case:

"This was a bill in equity, setting forth that the plaintiff and the defendant were owners of a manufactory in Framingham from 1823 to the time of filing the bill; that in 1826 they organized themselves, under an act of incorporation passed in 1813, by the name of the Framingham Manufacturing Company, and that the business, both before and after such organization, was carried on by them jointly as partners, and praying for an account and for general relief."

The plaintiff and the defendant purchased in equal portions the entire stock of a manufacturing company pursuant to a written agreement that they should thereby become partners in the business thus carried on.

"During the period from 1823 to 1826 the business of manufacturing was carried on in the factory under the direction of the parties, sundry goods were manufactured and sold, sundry parcels of stock were purchased, and moneys were advanced and received by the parties, respectively, and some accounts were rendered by one to the other purporting to set forth some of their dealings. No regular corporate meetings were held during that period, but such formal proceedings as were had appear from two books produced by the defendant as the records of the corporation."

The issue was as to whether the plaintiff and the defendant were partners or shareholders. The court, after discussing the difference in law between a shareholder and a partner, said:

"It was argued that the proposal of the defendant to the plaintiff to become jointly interested in this concern, each taking eight shares, made them partners or joint tenants or tenants in common, *ipso facto*, upon its adoption. But we cannot perceive that inference, for the corporation continued. The parties did not, by the new arrangement, acquire a legal title to the corporate property. They had, indeed, joint and equal control over it, but their acts and doings must appear through the proceedings of the corporation in the ~~the~~ forms of the law.

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"It is said that the parties held for two years without doing any corporate act. If it were so, we cannot perceive that they would become partners instead of corporators.

"Upon the whole, we are of opinion that these parties are not partners, tenants in common or joint tenants, and that the bill must be dismissed."

The court cited *Pratt v. Bacon*, 10 Pick. 123, likewise a decision of the court of last resort and to the same effect. The *Pratt Case* has been cited with approval in *Von Arnim v. American Tube Works*, 188 Mass. 515, and the *Russell Case* in *Welch v. Bank*, 122 N. Y. 189.

In this state, *Einstein v. Rosenfeld*, 38 N. J. Eq. (11 Stew.) 309, announces the same rule. The facts were similar to those in the case at bar, excepting that the corporation was a domestic one.

Chancellor Runyon said:

"It is urged, however, that in this case the corporation was but a mere form which the partners gave to what was, in fact, only a copartnership, and that this court is therefore at liberty to treat and deal with it as a copartnership. The bill alleges that the corporation is a *quasi* partnership. It appears by the answer that a partnership was at first agreed upon between the parties, but it was afterwards agreed between them to form a corporation instead. It is entirely clear that the court, in dealing with the subject, must treat the company as a corporation, and it cannot, in order to acquire jurisdiction over it to dissolve it, disregard and ignore its form and character."

This decision was quoted with approval by this court in *Sternberg v. Wolff*, 56 N. J. Eq. (11 Dick.) 389, which appeared again in chancery, 56 N. J. Eq. (11 Dick.) 555. Two sets of stockholders were contending for control. Complainant owned one-half of the stock and defendant the other half. Suit was filed to restrain the defendant from acting as treasurer and for a receiver.

In denying an order for an injunction and receiver, Vice-Chancellor Pitney held that the remedies available as between partners and "joint adventurers" cannot be applied to stockholders of corporations.

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The basic proposition upon which the bill and the injunction rest, viz., the partnership and agency theories, having thus been disposed of adversely to the complainant, the contention that a court of equity, acting *in personam*, may bind the conscience of a party even to the extent of sequestrating property in a foreign state, falls with it.

The remaining questions, two in number, are controlled by well-settled and familiar rules of corporation law.

The next question is whether the alleged agreement relied upon by the complainant, that the directors of the Illinois corporation, other than Jackson and Hooper, should be mere nominal directors without independent judgment and subject to their joint dictation and control, is enforceable. The complainant's position is that this agreement has been violated and he asks the court to enforce it.

Our Corporation law (section 12) provides that "The business of every corporation shall be managed by its directors." The law of Illinois is to the same effect.

The law thus confides the business management of the corporation to its directors. The directors must act in behalf of the corporation. They represent all of the stockholders and creditors and cannot enter into agreements, either among themselves or with stockholders, by which they abdicate their independent judgment.

Mr. Justice Garrison, in a recent decision of this court, expresses the same thought when he says:

"A contract by which the directors of such corporation in conclusive form abdicate their duty of management in this respect, and turn it over to an alien body, is in direct violation of the words and meaning of the statute, and is as typical an instance of an *ultra vires* act as can well be imagined. To do so in a given instance would be an illegal act." *McCarter v. Firemen's Insurance Co.*, 74 N. J. Eq. (4 Buch.) 372.

The United States court, in *West v. Camden*, 135 U. S. 507, lays down the same rule.

A director who does not direct is liable for his neglect of duty. *Kavanaugh v. Commonwealth Trust Co. of New York* (New York Supreme Court), 64 Misc. 303.



The very contract upon which the complainant relies, so far as it provides for the creation, election and maintenance of dummy directors, is contrary to every principle of the laws of this state. See *v. Heppenheimer*, 69 N. J. Eq. (3 Robb.) 36 (at p. 75).

For a discussion of the nullity of the acts of dummy directors by Leonard M. Wallstein, of the New York bar, see 15 *Yale L. Jour.* No. 3, January, 1906.

Finally, the court of chancery had no jurisdiction to issue the injunction in question. The court assumed to exercise visitorial powers over two foreign corporations which are not parties to this suit and to regulate the management of their internal affairs.

The phrase "internal affairs of a corporation," as here used, is well defined in the case of *North State, &c., Mining Co. v. Field*, 64 Md. 151, as follows:

"Where the act complained of affects the complainant solely in his capacity as a member of the corporation, whether it be as stockholder, director, president or other officer, and is the act of the corporation, whether acting in stockholders' meeting or through its agents, the board of directors, then such action is the management of the internal affairs of the corporation, and in case of a foreign corporation our courts will not take jurisdiction."

The courts of this state do not possess such jurisdiction, and any suggestion of its assumption we emphatically repudiate.

An injunction which enjoins the directors of a corporation as individuals, but with respect to corporate affairs, is an injunction against the corporation.

We are quite satisfied again to approve of the language of Vice-Chancellor, now Mr. Justice Reed, when, in the case of *Stockton, Attorney-General, v. American Tobacco Co.*, 55 N. J. Eq. (10 Dick.) 352, he said:

"Nor, in my judgment, is this result evaded by enjoining the officers individually instead of restraining the corporation. It is perfectly obvious that what has been done since the organization, and what is intended to be done in the future, are corporate and not individual acts. The power of the corporation

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to select its officers and agents in the manner prescribed by the Corporation act or permitted by law is plenary. Now, it seems a paradox to say that a corporation can do, through its agents, what the agents cannot do. Inasmuch as corporate existence can only be manifested through its officers, and corporate privileges can only be utilized by means of agents, it is impossible to detach the corporation from those who represent it and deny to the latter what is conceded to the former. An injunction which ties the hands of the officers and agents of a corporation from transacting any corporate business is the exact equivalent of an injunction which prevents the corporation from transacting any business, which, as already remarked, is the equivalent of a judgment on *quo warranto*."

It is unnecessary to analyze again the terms of the injunction in referring to its extraordinary scope and effect.

In a form, sweeping, mandatory and embodying the ingenious theory of the complainant, the injunction, while purporting not to disturb or interfere with the integrity and autonomy of the foreign corporations, but only to enjoin the individuals from transferring property of an extensive business having its *situs* in foreign states, does, in fact, substance and effect, regulate and control the internal affairs of corporations chartered by foreign sovereignties and prevents freedom of action on the part of corporations not made parties to the suit, which we have held to be distinct legal entities and controlled by foreign laws. In violation of every obligation of official duty and responsibility imposed by law upon officers and directors, it substitutes the will of the chancellor for deliberate corporate action.

Such assumption of power cannot be approved or tolerated without a complete destruction of equitable doctrine as applied to corporations, and a subversion of the law affecting corporate rights, duties and relations.

As Chancellor Runyon said in *Gregory v. New York, &c., Railway Co.*, 40 N. J. Eq. (18 Stew.) 38:

"It is almost too obvious for remark that this court cannot regulate the internal affairs of foreign corporations, nor can it enforce its decree out of this state."

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State comity is opposed to the assumption of such jurisdiction and to the usurpation by one state of the power of another over its own institutions.

The decision of the foregoing questions renders it unnecessary to discuss the other subordinate propositions raised by the briefs.

We hold that the parties are not partners as to the corporate property, but merely stockholders in two foreign corporations, distinct legal entities; that the agreement whereby these dummy directors were bound to act in accordance with the will of the complainant and Hooper was illegal and therefore unenforceable in any court; that the whole subject-matter of the controversy relates to, and the injunction attempts to regulate, the management of the internal affairs of two foreign corporations; that the court of chancery has no jurisdiction to entertain the bill and that the injunction and all proceedings thereunder should be vacated and held for naught.

For the reasons already given the order appealed from is reversed, with costs.

*For affirmance*—None.

*For reversal*—THE CHIEF-JUSTICE, GARRISON, SWAYZE, REED, TRENCHARD, PARKER, BERGEN, VOORHEES, MINTURN, BOGERT, VROOM, GRAY, DILL, CONGDON—14.

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6 Buch.Mayor v. Jersey City Water-Supply Co.

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THE MAYOR AND ALDERMEN OF JERSEY CITY, respondent,

v.

JERSEY CITY WATER-SUPPLY COMPANY, appellant.

[Argued November 16th, 1909. Decided February 28th, 1910.]

On cross-appeals from a decree of the court of chancery advised by Vice-Chancellor Stevens, whose opinion is reported in 74 N. J. Eq. (4 Buch.) 104.

*Mr. James J. Murphy, Mr. Warren Dixon and Mr. James B. Vredenburg*, for the municipality.

*Messrs. Collins & Corbin*, for the water-supply company.

PER CURIAM.

Our consideration of this case has led us to the conclusion that the decree advised by the learned vice-chancellor should be affirmed, with one unimportant exception, and for the reasons set forth in his opinion filed in the cause. The particular in which we cannot agree with him is his holding that in the ascertainment of the amount to be paid by the city the water-supply company should be charged with one-half the cost of constructing a fence around the land occupied by the Boonton reservoir. The suit is brought to compel the specific performance of a contract to construct a water-supply system in accordance with full and complete plans and specifications and to convey the same to the city. The obligations of the water-supply company, with relation to the construction of the system, are fixed by the contract. The requirements applicable to the Boonton reservoir site are set out in great detail, but do not provide for the construction of a fence around it. The vice-chancellor considered that the provisions of the Fence act made it the duty of the water-supply company to construct a fence around the

reservoir. To inject the provisions of the Fence act into the contract would be to add a term to it not agreed upon by the parties; and this, we think, a court cannot do.

Some criticism has been made upon the form of the decree. In providing what sums shall be deducted from the contract price on account of the failure to construct the water-supply plant in complete accordance with the plans and specifications, the mandate of the decree is as follows:

"There shall also be deducted from the contract price the cost of establishing intercepting sewers and drains, and sewage disposal works, capable of substantially preventing the contamination of the Rockaway river, above the Boonton reservoir, from the sewage of the city of Dover, the city of Boonton and the village of Hibernia; which cost shall hereafter be determined by the court.

"In lieu of and as a substitute for all or any of the sewers and sewage disposal works above referred to in this paragraph, the defendant company may, within ninety days from the date hereof, present other plans or devices for maintaining the purity of the water delivered by the company to the city throughout the year, under present conditions, and estimates of the cost of the works now necessary therefor; and both parties may present evidence touching the efficiency of such plans or devices to produce the necessary results, and the cost thereof; and the defendant company may, pending the taking of the testimony, with the leave of the court, upon notice, present amendments and modifications of such plans and devices."

As we read this provision of the decree, the second part of it is in modification of the first part, the purpose disclosed by it being to relieve the water-supply company from the deduction, from the purchase price, of the cost of establishing sewers, drains and sewage disposal works for the prevention of the contamination of the Rockaway river above the Boonton reservoir, provided the company is able to exhibit a less expensive plan or device for preventing such contamination, and which will insure that result; and, if the company shall succeed in doing so, then permitting the cost of the works necessary for the installation of such plan or device, instead the cost of constructing sewers,

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drains and sewage disposal works, to be deducted from the contract price. So read the decree seems to us to be manifestly fair and just to both parties, and to afford no ground for criticism.

The error in requiring the water-supply company to submit to a reduction in the contract price on account of its failure to construct a fence around the Boonton reservoir requires a modification of the decree and a reversal for that purpose.

*For affirmance*—None.

*For reversal*—THE CHIEF-JUSTICE, GARRISON, SWAYZE, REED, PARKER, BERGEN, VOORHEES, MINTURN, BOGERT, VREDENBURGH, VROOM, GRAY, DILL—13.

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KATHARINA MOTZ, respondent,

v.

GEORGE J. MOTZ, appellant.

[Argued November 18th, 1909. Decided February 28th. 1910.]

On appeal from a decree of the court of chancery advised by Vice-Chancellor Stevens.

*Mr. Frank E. Bradner*, for the appellant.

*Mr. Nathan Kussy* and *Mr. Theodore D. Gottlieb*, for the respondent.

PER CURIAM.

The decree appealed from is affirmed, for the reasons stated in the opinion filed by Vice-Chancellor Stevens in the court below.

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Congregational Church Bldg. Society v. Trustees.

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*For affirmance*—THE CHIEF-JUSTICE, GARRISON, SWAYZE, REED, TRENCHARD, PARKER, BERGEN, VOORHEES, MINTURN, BOGERT, VREDENBURGH, VROOM, GRAY, DILL, CONGDON—15.

*For reversal*—None.

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CONGREGATIONAL CHURCH BUILDING SOCIETY, respondents,

v.

TRUSTEES OF THE SOCIETY OF THE FIRST CONGREGATIONAL  
CHURCH OF JERSEY CITY, appellants.

[Argued November 18th and 19th, 1909. Decided February 28th, 1910.]

On appeal from a decree of the court of chancery advised by  
Vice-Chancellor Howell.

*Mr. Frank H. Hall* and *Mr. Maximilian T. Rosenberg*, for the  
appellants.

*Mr. Corra N. Williams* and *Mr. Edward M. Colie*, for the  
respondents.

PER CURIAM.

The decree appealed from is affirmed, for the reasons stated in  
the opinion filed by Vice-Chancellor Howell in the court below.

*For affirmance*—THE CHIEF-JUSTICE, GARRISON, SWAYZE, REED, TRENCHARD, PARKER, BERGEN, VOORHEES, MINTURN, BOGERT, VREDENBURGH, VROOM, GRAY, DILL, CONGDON—15.

*For reversal*—None.

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6 Buch.Stephany v. Marsden.

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ALBERT C. STEPHANY, appellant,

v.

JOHN E. MARSDEN et al., respondents.

[Argued November 19th, 1909. Decided February 28th, 1910.]

On appeal from a decree of the court of chancery advised by Vice-Chancellor Leaming.

*Mr. Ulysses G. Styron* and *Mr. Joseph H. Gaskill*, for the appellant.

*Mr. Norman Grey*, for the respondents.

PER CURIAM.

The bill in this case was filed by a stockholder of the Liberty Cut Glass Works, a corporation of this state, not only on his own behalf, but "for and in behalf of said corporation, and of all other stockholders of said corporation." The purpose of the bill as stated in the brief of counsel for the appellant, was to obtain a declaration by the court of chancery that three hundred shares of the capital stock of the corporation of the par value of \$15-000, issued to certain persons called the promoters, for property transferred to the company, and which stock is now held by Marsden, was issued without value, and is held in fraud of the rights of the stockholders, and, further, to obtain a decree that the shares so issued and held were without value in the hands of Marsden, and that they should be surrendered and canceled, at least to the extent that the consideration for their issue failed.

The stock, which is the subject-matter of the controversy, was issued to Marsden, and those from whom he purchased it in October, 1902. The complainant's bill was filed in July, 1907, nearly five years later. The proofs in the cause show that the transaction which involved the issuing of the stock, and the



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taking over by the company of the property for the purchase of which it was issued, was not a secret one, but was known to and understood by the complainant and his fellow-stockholders at the time that the transaction took place. No excuse for not promptly challenging the legality of the transaction appeared in the case, and the learned vice-chancellor, before whom it was heard, concluded that the long delay in the assertion of the claim set up in the bill operated as a bar to the relief sought.

Assuming that, upon a proper case made, the complainant would be entitled to a decree such as is prayed for, we think the conclusion reached by the vice-chancellor was justified on the merits. We are not, however, willing to concede the soundness of the assumption. Where stock is fraudulently issued for property purchased in excess of the value of that property, it may well be doubted whether the remedy is to compel the surrender and cancellation of the stock. Such a method of reducing capital stock is not that provided by the Corporation act; and to permit its adoption might be to seriously imperil the rights of creditors. The decision of the case against the complainant on the merits eliminates that question from the controversy, however, and we only refer to it for the purpose of guarding against the inference that, by affirming the decree under review, we affirm the right of the court of chancery to compel the cancellation of stock issued for property purchased, when the issue is fraudulently made in excess of the value of that property, provided that prompt appeal is made to the court for that purpose.

The decree appealed from will be affirmed.

*For affirmance*—THE CHIEF-JUSTICE, GARRISON, SWAYZE, REED, TRENCHARD, PARKER, BERGEN, VOORHEES, MINTURN, BOGERT, VREDENBURGH, VROOM, DILL, CONGDON—14.

*For reversal*—None.

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6 Buch.Ballantine v. Young.

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JEANNETTE BALLANTINE et al., trustees, &amp;c., respondents,

v.

ALICE I. YOUNG et al., appellants.

[Argued November 22d, 1909. Decided February 28th, 1910.]

On cross-appeals from a decree of the court of chancery advised by Vice-Chancellor Stevens, whose opinion is reported in 74 *N. J. Eq.* (4 Buch.) 572.

*Mr. John O. H. Pitney*, for the trustees.

*Mr. Chauncey G. Parker*, for the adult defendants.

*Mr. Gilbert Collins*, for the infant defendants.

PER CURIAM.

We reach the conclusion that the portions of the decree brought up by these appeals should be affirmed, for the reasons set forth in the opinion filed by the learned vice-chancellor in the court below.

A considerable part of the opinion is devoted to a discussion of the right of trustees under a will, who have invested funds of their testator in interest-bearing bonds which they have purchased at a premium, to withhold from time to time so much of the interest received as will, at the maturity of the bonds, equal the amount of the premiums paid therefor. That portion of the decree which deals with this phase of the litigation was not appealed from, and we therefore express no opinion as to the soundness of the view upon which it is rested.

*For affirmance*—THE CHIEF-JUSTICE, GARRISON, SWAYZE, REED, TRENCHARD, PARKER, BERGEN, MINTURN, BOGERT, VREDEBURGH, GRAY, DILL, CONGDON—13.

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*For affirmance*—THE CHIEF-JUSTICE, GARRISON, SWAYZE, REED, TRENCHARD, PARKER, BERGEN, VOORHEES, MINTURN, BOGERT, VREDENBURGH, VROOM, GRAY, DILL, CONGDON—15.

*For reversal*—None.

*For affirmance*—THE CHIEF-JUSTICE, GARRISON, SWAYZE, REED, TRENCHARD, PARKER, BERGEN, MINTURN, BOGERT, VREDENBURGH, VROOM, GRAY, DILL, CONGDON—14.

*For reversal*—VOORHEES—1.

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CARRIE L. G. HARRISON et al., appellants,

v.

CHARLES F. AXTELL et al., executors, &c., et al., respondents.

[Argued November 23d, 1909. Decided February 28th, 1910.]

On appeal from a decree of the prerogative court, affirming a decree of the Morris county orphans court admitting to probate the last will and testament of Esther J. Cooper, deceased, reported in 75 N. J. Eq. (5 Buch.) 177. *Sub nom. In re Cooper's Will.*

*Mr. C. Franklin Wilson and Mr. John M. Mills*, for the appellants.

*Mr. Willard W. Cutler and Mr. Charlton A. Reed*, for the respondents.

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6 Buch.Farrell v. Bork.

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PER CURIAM.

We concur in the opinion expressed by the ordinary that the respondent Axtell fairly sustained the burden of showing that the will was not the product of undue influence, but of the full and independent judgment of the testatrix, and, for this reason, affirm the decree under review.

*For affirmance*—THE CHIEF-JUSTICE, GARRISON, SWAYZE, REED, TRENCHARD, PARKER, BERGEN, VOORHEES, MINTURN, BOGERT, VREDENBURGH, VROOM, GRAY, CONGDON—14.

*For reversal*—None.

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ALEXANDER M. FARRELL, respondent,

v.

ALBERT BORK, appellant.

[Argued November 24th, 1909. Decided February 28th, 1910.]

On appeal from a decree of the court of chancery advised by Vice-Chancellor Leaming.

*Mr. Clarence L. Cole*, for the appellant.

*Mr. Ulysses G. Styron*, for the respondent.

PER CURIAM.

The decree appealed from is affirmed, for the reasons stated by Vice-Chancellor Leaming in deciding the case in the court below.

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*For affirmance*—THE CHIEF-JUSTICE, SWAYZE, REED, TRENCIARD, BERGEN, VOORHEES, MINTURN, BOGERT, VREDENBURGH, GRAY, DILL, CONGDON—12.

*For reversal*—GARRISON, PARKER, VROOM—3.

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ESTELLA MCCARTHY, respondent,

v.

EPIHRAIM CUTTER et al., appellants.

[Submitted December 7th, 1909. Decided February 28th, 1910.]

On appeal from a decree of the court of chancery advised by Vice-Chancellor Howell.

*Mr. Patrick H. Gilhooly* and *Mr. Samuel Koestler*, for the respondent.

*Mr. Charles Hommann*, for the appellants.

PER CURIAM.

This is an appeal from an interlocutory decree directing the appellants, who are executors and trustees under the will of Samuel Dally, deceased, to render an account of their stewardship. Dally died in 1895. The complainant, by the terms of his will, is entitled to one-fourth of the income of his residuary estate. No account at all was filed by the appellants from the time of his death until the year 1903, and no account has been filed by them since the latter date. They have made but one payment to the complainant under the residuary devise to her. That payment was made in December, 1900, and amounted to \$90. The right of the complainant to an accounting under these

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circumstances is so plain that no attempt has been made by the appellants to support their appeal, either by printed brief or oral argument. It has practically been abandoned, and should never have been taken.

The decree brought up by the appeal will be affirmed.

*For affirmance*—THE CHIEF-JUSTICE, GARRISON, SWAYZE, REED, TRENCHARD, PARKER, BERGEN, VOORHEES, MINTURN, BOGERT, VREDENBURGH, VROOM, GRAY, DILL, CONGDON—15.

*For reversal*—None.



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**CHARITABLE TRUSTS**—1. A gift of property to a personal trustee to use the income to keep certain graves in good condition forever was not a charity, but a purely private trust and void as a perpetuity, notwithstanding 1 Gen. Stat. 1895 pp. 350, 351 §§ 7, 14, providing for the incorporation and regulation of cemetery associations. *HILLIARD v. PARKER*..... 447

2. — A gift of a fund, the income of which was to be expended by the executor to purchase fuel for the most needy women in the borough of W., to be selected by the executor, excluding women living with their husbands, was a charitable trust, and therefore not objectionable as offending the rule against perpetuities. *Id.*..... 447

3. — A trust to use the income of a fund to purchase fuel for the most needy women in W., to be selected by testator's executor, excluding women living with their husbands, was not void for uncertainty. *Id.*..... 447

4. — A gift of the income of a fund to be paid annually to the treasurer of a library to be expended in the purchase of books, and to be and remain always a fund for that purpose, was a valid charity; and a library association which issued stock to members, entitling each to borrow books from the library, subject to payment of fines for delay, and which also issued permits to others, not stockholders, to borrow books on payment of five cents per week for each volume, no dividends being paid to stock-

CHARITABLE TRUSTS—*Continued.*

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holders, the object of the association being to disseminate knowledge by means of books, periodicals, reviews, and other literature, was a charitable corporation and therefore authorized to take and use the income of the trust for the purchase of books to be used in connection with the library, and hence the gift was not violative of the rule against perpetuities; the *corpus* of the bequest forming no part of the assets of the association. *Id.*... 447

COMMISSIONS—*See* TRUSTS AND TRUSTEES.

COMPROMISE—Where the extent of a widow's claim to personal property under a will was doubtful, a family settlement entered into by all parties in interest who are of full age without fraud, would not be set aside because of alleged inadequacy of consideration in so far as it affected one of the parties. *BELL v. WHITE.* 49

CORPORATIONS—1. Where an assignment of shares in a building association was made to a bank as collateral before the termination of the charter of the bank, and it continued to transact business as a corporation under the theory that its charter was extended by 1 *Gen. Stat.* 1895 p. 972, as construed by the banking and insurance department, the assignment should not be declared invalid because of a supposed legal non-existence of the corporation during the loans secured by the assignment. *CAMPBELL v. PERTH AMBOY, &C., ASSOCIATION.*..... 348

2. — Two individuals purchased all the stock of a business corporation under an agreement that they should be partners, having equal voice and equal control in the management and business of the company; that the corporation should be treated as a mere agency in carrying out the copartnership agreement; that the directors, other than the two parties, should be mere nominal directors; that corporate forms should be ignored and the business transacted and treated as a partnership business. This having been done for a time the parties disagreed.—*Held*, that a court of equity has no power to take the corporate property into its control, as upon the dissolution of a copartnership, but that the rights of the parties must be administered as shareholders in the corporation, not as partners. *JACKSON v. HOOPER.*..... 592

3. — An agreement between shareholders controlling the stock of the corporation, that certain directors shall act as nominal or dummy directors, subservient to the will of the parties, is illegal and cannot be enforced in a court of equity. *Id.*..... 592

4. — An injunction against the persons who compose the board of directors of a corporation enjoining them individually in respect to corporate affairs, is an injunction against the corporation. *Id.*..... 592

5. — A court of equity has no jurisdiction to regulate the management of the internal affairs of a corporation organized under

CORPORATIONS—*Continued.*

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foreign laws, through the medium of an injunction issued either against the members of the board of directors as individuals, who are parties to the action, or against the corporation directly. *Id.* ..... 592  
*See* BUILDING AND LOAN ASSOCIATIONS. 3.

COUNSEL FEES—*See* WILLS, 7, 8.

COVENANTS—*See* RESTRICTIVE COVENANTS.

- CREDITORS' BILLS—1. Complainant in equity must allege with particularity every material fact which it is necessary for him to prove to establish his right to the relief prayed. *HAGEMAN v. BROWN* ..... 126
2. — Where complainant seeks equitable relief on the ground of fraud, his bill must state the facts constituting the fraud, so that the person against whom relief is sought may have full opportunity to deny or explain the facts charged, and disprove them. *Id.* ..... 126
3. — Where a creditor's bill sought to reach certain money belonging to defendant alleged to have been secretly hidden in real estate purchased in the name of another in a specified manner, with a fraudulent purpose of placing it beyond the reach of creditors and preserving it for defendant's use by means of a secret trust, the manner in which the bill charged that the fraud was accomplished was a material part of complainant's cause of action, which defendant was required to specifically answer with fullness and particularity. *Id.* ..... 126
4. — That a bill to reach property held for defendant under an alleged secret trust was not a bill for discovery and contained no interrogatories, would not exempt defendant from answering fully and specifically all the material averments of the charging part of the bill. *Id.* ..... 126
5. — The object of a complainant in waiving oath to the answer to a bill in equity is merely to deprive the defendant of his right to have the answer treated as evidence in his favor. *Id.*... 126

CROSS-BILL—*See* ANSWER, 3.

## D.

DECREE—*See* DIVORCE, 4, 8; RAILROAD CROSSINGS. 13.

DEDICATION—1. Evidence held to show a dedication to public use of certain property marked on a plat. *BOROUGH OF SPRING LAKE v. POLAK* ..... 212

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2. — Evidence *held* to show an acceptance by a borough of a dedication of property to public use. *Id.*..... 212
3. — The bringing by a municipality of a suit to enjoin defendants from using certain property, and the allegation in the bill of a dedication of the property to public use, and an acceptance thereof, was of itself an acceptance. *Id.*..... 212
4. — But little affirmative action is required to indicate an intention to accept a dedication of property to public use. *Id.*.... 212

DEEDS—1. When a deed of conveyance duly delivered by the grantor has remained for a long period of years, in the possession of the grantee, its acceptance, nothing appearing to the contrary, will be inferred; and a like inference arises where the deed was for the benefit of the grantee. *LAKE v. WEAVER*..... 280

2. — The title to land, if once vested in a grantee by the acceptance of a valid deed of conveyance, cannot, in legal contemplation, be revested by the grantee in the grantor or his heirs save by an appropriate documentary act; in the absence of such an act the fact that the deed was not recorded or that it was lost is ineffectual either to divest the legal estate or to revest it in those who appear as owners of record. *Id.*..... 280

DEMURRER—1. For misjoinder of parties defendant those only can demur who are improperly joined. *MCCULLOUGH v. WARD*..... 454

2. — Where the demurrer raises the objection that the bill discloses that the real estate sought to be partitioned is in the possession of the demurrant under a claim of title adverse to the title asserted by the complainant, the demurrer will be allowed. *Id.*..... 454  
*See* STRIKING OUT PLEADINGS.

DISMISSAL OF BILL—A motion to dismiss a bill under rule 213 assumes that all the material averments of the bill are true. *SCHWOEBEL v. STORRIE*..... 466

DIVORCE—1. Events happening after the bringing of the original suit are interjected into it by leave of the court by supplemental bill or answer, and, as to the facts set up therein, they relate to the dates of happening thereof. *VON BERNUTH v. VON BERNUTH*. .... 177

2. — A husband may be enjoined from maintaining in another state an action for separation instituted subsequent to the commencement in New Jersey of a suit for divorce by his wife and his appearance and answer therein, where his action is vexatious and harassing to her, and if the two causes are allowed to proceed, will undoubtedly be embarrassing to the courts of

DIVORCE—*Continued.*

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- both states, and likewise on the general ground that the cause of action was within the jurisdiction of the New Jersey court before any attempt was made to compel the wife to submit to a foreign tribunal, and where such injunction will not contravene the public policy of such other state. *Id.*..... 177
3. — Where a husband, pending suit against him for divorce, applied for the right of access to and custody of his children, two boys, ten and fifteen years of age, respectively, and they, on a private examination, exhibited extreme hatred for their father, absolutely refusing to see him, and declined to entertain any propositions looking toward the father's society, which it appeared resulted from the mother's adverse influence over them, the father's application will be denied; but he was entitled to a reduction of alimony for their support from \$46 to \$10 a week. *Id.* ..... 200
4. — Where a mother, after securing a judgment in a New Jersey court awarding her the custody of her children, left the state, and the father, on application to the court, obtained a modification of the judgment permitting the children to visit him in the State of New York, where he resided, the order of modification was within the protection of the clause of the federal constitution declaring that full faith and credit shall be given in each state to judicial proceedings of every other state. *DIXON v. DIXON.*..... 364
5. — Where the mother, in such case, commenced an action for divorce in the state to which she removed, the court, in such action, might determine the right to custody of the children on conditions arising since the order of the New Jersey court, but could not base its adjudication on evidence of facts occurring before that order. *Id.*..... 364
6. — Where the mother, on application in the divorce suit for an order for the sole custody of the children pending suit, offered no evidence of facts occurring since the modified order of the New Jersey court, except that on the return of the children to the mother from a visit to the father, under order of the court, they were in poor health, such poor health not being ascribed to the treatment of the father, an order in such divorce suit, granting the prayer for such custody, being based on the facts occurring before the order of the New Jersey court, was of no effect, since it failed to give full faith and credit to the New Jersey judgment. *Id.*..... 364
7. — Where, on presentation of a petition by a husband for commitment of the wife for violating an order as to the custody of the children, she had not yet disobeyed it, but her counsel had given notice that she would not obey it in view of an order of a court of another state, and her counsel disavow any inten-



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tional disrespect to the court making the former order, she will not be adjudged in contempt, though the order of the foreign court is not valid. *Id.*..... 304

8. — Where, after an order granting to a wife the custody of the children with a provision that they be sent to visit at the husband's home two months of each year, she commenced suit in another state for divorce, and procured an order for sole custody of the children pending suit, but the situation was otherwise unchanged, the former order would not be modified to give the husband custody of the children. *Id.*..... 364
  
9. — In a proceeding for contempt for violating an order as to the custody of the children of divorced parents, where the right to the custody was determined according to the claims of the petitioner, but there had not been an actual violation of the order, and only notice of an intended violation, neither party would be charged with costs. *Id.*..... 364
  
10. — At final hearing of a suit for divorce against a wife for adultery, her guilt was ascertained and a decree *nisi* was entered. On motion of complainant a prior order for the payment of alimony *pendente lite* was suspended. *WARWICK v. WARWICK* ..... 474
  
11. — Defendant in a suit for divorce may plead in bar a matrimonial offence committed by complainant which accrued after the filing of the original bill. *VON BERNUTH v. VON BERNUTH*.. 487
  
12. — A defendant in a suit for divorce may plead by cross-bill a matrimonial offence, entitling him to a divorce, which had not accrued when the original bill was filed, but which did accrue prior to the filing of the cross-bill, and obtain the same relief which he might have obtained by filing an original bill as of the same date. *Id.*..... 487
  
13. — Where plaintiff in a suit for divorce was a *bona fide* resident of New Jersey, and defendant, a resident of New York, duly appeared and answered, the court had jurisdiction to grant defendant a divorce on a cross-bill without personal service of process on the original complainant under chancery rule 206a providing for relief to defendants in chancery, in so far as the same had not been modified by the Divorce act. *Id.*..... 487
  
14. — Where a wife in a bill for divorce made charges of matrimonial offences against her husband sufficient, if true, to have warranted his indictment and punishment by the criminal courts, and repeated and enlarged the same in an amended bill, but on the trial after the filing of a cross-bill by the husband demanding a divorce for desertion, which did not accrue until some time after the filing of the wife's bill, she declined to pro-

DIVORCE—*Continued.*

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duce any evidence in defence of her husband's claim or to prove her own charges, she would be regarded as having filed her bill in bad faith, and hence was not entitled to set up the filing thereof in bar of her husband's right to a divorce because the grounds had not accrued at the time of the filing of her bill. *Id.*..... 487

DOWER—C. C. by the death of his father, became seized of an estate of inheritance in fee in certain lands, and conveyed the same by quitclaim deed to his mother, the widow, for the term of her life only. The deed contained no words of inheritance. C. C. married, and died in the lifetime of his mother, the grantee, who died afterwards.—*Held*, that the fee and the inheritance remained in C. C. during his life, notwithstanding the estate in his mother for her life, and consequently, he was seized of an estate of inheritance during coverture; therefore, his widow is entitled to dower. *CUMMINGS v. CUMMINGS*..... 568

DURESS—1. Evidence *held* to show that a deed was induced by threats of the grantee of the immediate arrest and imprisonment of a son of the grantors for obtaining money from the grantee under false pretences. *BALL v. WARD*..... 8

2. — A grantor, suing to set aside a deed induced by the threats of the grantee of the arrest of a son of the grantor for obtaining money under false pretences, on the ground that the deed was executed pursuant to an agreement to stifle a criminal prosecution, must allege and prove that a crime had been committed by the son which was compounded, or the prosecution of which was stifled. *Id.*..... 8

3. — Evidence, in a suit to set aside a deed as induced by the threats of the grantee of the arrest of a son of the grantor for obtaining money by false pretences, *held* not to show that the money was obtained under false pretences and that the threats for his arrest were threats of unlawful imprisonment. *Id.*..... 8

4. — An agreement between debtor and creditor to compound a crime committed by the debtor, or to stifle the prosecution thereof, makes the transaction for the payment of the debt illegal, which illegality may be unconnected with the question of duress, for the illegal agreement may be offered by the debtor himself voluntarily and without any pressure from the creditor. *Id.*..... 8

5. — It is against equity for a creditor to extort from a parent payment of or security for the debt of a son, for which the parent is not responsible, by threats of criminal prosecution of the son, though an imprisonment of the son would be lawful or supposed to be lawful, and contracts of the parent for such payment or security, executed under circumstances created by the creditor which deprive the parent of the freedom and power of deliberation necessary to validate such transactions, may be avoided in equity, as made without consent. *Id.*..... 8

**DURESS—Continued.**

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6. — An agreement to convey property in satisfaction of an embezzlement in consideration of a promise not to prosecute for the crime, is illegal. *JOUDAN v. BURSTOW*..... 55
7. — Where property is conveyed in satisfaction of an embezzlement which has been committed, in consideration of a promise not to prosecute before the time, such property cannot be recovered back. *Id.*..... 55

**E.**

- EASEMENTS**—1. When the owner of two tenements sells one of them, or the owner of one entire estate sells a portion, the purchaser takes the tenement or portion sold with all the benefits and burdens which appear at the time of sale to belong to it, as between it and the property which the vendor retains. *TAYLOR v. WRIGHT*..... 121
2. — The principle illustrated with respect to the case of overhanging eaves and porch as a *quasi*-easement reserved by implication for the benefit of the complainant as vendor. *Id.*..... 121
3. — The easement in question is of the class defined as continuous. *Id.*..... 121
4. — An action at law before the law court is the proper remedy for the determination of the existence or non-existence of such an easement, and the court of chancery will not enjoin the prosecution of such an action. *Id.*..... 121

**ESTATES BY ENTIRETY—See HUSBAND AND WIFE.**

- ESTOPPEL**—Admissions or declarations of the holder of the legal title to land that have not induced any action or inaction in other claimants or worked any change in their status do not constitute an estoppel. *LAKE v. WEAVER*..... 280

**F.****FEDERAL CONSTITUTION—See DIVORCE. 4-8.**

- FORECLOSURE SUIT**—1. In a suit to foreclose a purchase-money mortgage, a cross-bill, praying not only for an abatement of the mortgage debt, but for the surrender of the mortgage for cancellation, on its being found that the debt had been discharged, will be considered on demurrer as presenting equitable claims properly presented by answer by way of cross-bill, though an abatement of the mortgage debt may be gained by answer. *PETERSON v. REID* ..... 377

**FORECLOSURE SUIT—Continued.**

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2. — A cross-bill, in a suit to foreclose a purchase-money mortgage, which alleges that the assignee of the mortgagee bringing the suit has no interest in the litigation, but is prosecuting it for the mortgagor, and which demands damages for the breach of the mortgagee's covenant to fill in the land sold by him to the mortgagor, is not demurrable for failing to make the mortgagee a party, but the assignee may make him a party. *Id.*..... 377
3. — The mere fact that the damages sought to be set up as an abatement of the mortgage debt in a suit to foreclose the mortgage are unliquidated does not prevent equity from granting the abatement; the damages may be ascertained by a jury in a law court or by the court of chancery. *Id.*..... 377
4. — Where a vendor of lowland of small value covenanted to fill in the same, and the purchaser gave a mortgage for the price, based on the valuation of the land filled in, one succeeding to the rights of the purchaser under the conveyance from the vendor and his covenant could, in a suit to foreclose the mortgage by an assignee having no interest in the litigation, reduce the mortgage debt to the extent of the damages sustained by the vendor's breach of covenant. *Id.*..... 377
5. — A vendor of lowland of small value covenanted to fill in the same. The purchaser gave a mortgage for the price, based on the valuation of the land filled in. A third person acquired the purchaser's rights. After the time for performance, the vendor and the third person entered into an agreement, whereby the vendor agreed to perform the covenant. Prior to the agreement the vendor had assigned the mortgage to an assignee, who was a mere volunteer, and who had no actual interest in the matter. —*Held*, that in a suit by the assignee to foreclose the mortgage, the third person could reduce the mortgage debt to the extent of the damages sustained by the vendor's breach of the original covenant. *Id.*..... 377  
*See JUDICIAL SALES; MORTGAGES.*

**FOREIGN CORPORATIONS—See TRUSTS AND TRUSTEES.**

- FRAUD**—1. Where defendants in a suit fail to produce one of the defendants as a witness, or his deposition, and his testimony under the circumstances of the case is of the last importance to the other defendants, and the failure to produce him is not explained, the court will expect from the remaining defendants evidence of a character that is clear and convincing to sustain their defence, and any uncertainties in the evidence which he might have cleared up will be resolved in favor of the complainant. *JOHNSTON v. MCKENNA*..... 217
2. — Where a transfer of an equity of redemption of great value for a totally inadequate consideration and on an understanding

**FRAUD—Continued.**

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that it was being taken for the benefit of the mortgagor is procured, the burden of proof, in an action to compel the transferees to account to the mortgagor, is shifted to the transferees, who are called upon to give the utmost explanation and the freest and most open disclosures of all the facts. *Id.*..... 217

3. — In a suit to reach the surplus arising from a mortgage foreclosure sale, evidence *held* to show that defendants procured a transfer of the equity of redemption at a totally inadequate consideration, and under an understanding that the mortgagor's interests would be protected so as to render them liable to the mortgagor for the loss sustained. *Id.*..... 217

4. — Where, in a suit to reach the surplus arising from a foreclosure sale it is shown that defendants, transferees of the equity of redemption, obtained the transfer through fraud, a decree for the loss occasioned to the mortgagor by the actions of the transferees may be had against them personally, and it is not necessary to follow the property. *Id.*..... 217

## G.

**GIFTS**—1. Where the principal of a wife's separate estate comes to the possession of her husband, and is used by him, the presumption of law is against a gift. *ELMER v. TRENTON TRUST AND SAFE DEPOSIT CO.*..... 452

2. — Evidence *held* to show that money coming to the possession of a husband from his wife's separate estate was not a gift. *Id.*..... 452  
See **INSURANCE, LIFE**, 3.

## H.

**HUSBAND AND WIFE**—1. When husband and wife hold lands by an estate in entirety, the wife, during the joint lives of herself and husband, is entitled to her share of the usufruct of the land, and the right of survivorship in the fee still exists as at common law. *SERVIS v. DORN*..... 241

2. — Judgments recovered against a husband, who, together with his wife, owns land by an estate in entirety, are liens against the husband's interest and are enforceable against the land if he survives his wife, but are subject to be defeated as to that land in the event of her surviving him. *Id.*..... 241  
See **GIFTS**.

**INFANTS, CUSTODY OF**—See **DIVORCE**.

- PAGE.
- INJUNCTIONS**—1. Where the title to land sought to be taken to widen a highway was in dispute and complainant was in the actual possession claiming title, which was not clearly in the board of freeholders of the county, complainant would be granted a preliminary injunction restraining the board from taking possession of the strip until their legal right had been settled; it appearing that to withhold the injunction would destroy complainant's freehold, to his irreparable injury. *BRUNSON v. BOARD OF FREEHOLDERS OF SOMERSET*..... 480
2. — Where a water company, without authority, laid its pipes on the towpath of a canal company, ousting the canal company from possession thereof, there was an ample remedy at law in trespass or ejectment, and a mandatory injunction which alone would give adequate equitable relief would not be granted; such injunction rarely issuing as a provisional remedy, and not being permitted to usurp the legal remedy of ejectment. *LEHIGH VALLEY RAILROAD CO. v. N. Y. & N. J. WATER CO.*..... 504
3. — While equity will protect an easement by injunction, it must clearly appear that there is an easement, and its character and extent must be plain, and a preliminary injunction will not be granted to protect an alleged easement of a canal company in adjacent land upon which earth from the canal had been deposited from the laying of a water company's pipes therein, where the extent of the canal company's easement, whether to the width of the actual bank or to the width of a strip of land upon which the earth was deposited at the time the canal was built, does not appear, and the character of the water company's rights therein are not shown. *Id.*..... 504
4. — It appearing that the canal company had not for several years used the canal for purposes of transportation, it simply being an open, unused ditch, with a towpath on one side over which the public had a right to pass, but did not pass, the laying of the water pipes in the spoil bank on the adjacent land, or on the towpath at overhead crossings, was not shown to have caused irreparable damage justifying injunctive relief. *Id.*.... 504  
*See* DIVORCE, 2; NUISANCE.
- INSOLVENCY**—1. In the distribution of assets among the stockholders of an insolvent building and loan association neither the owners of stock known as "full paid stock" nor owners of stock known as "advance payment stock" are entitled to preferment as such. *FITZGERALD v. STATE MUTUAL BUILDING AND LOAN ASSOCIATION.* ..... 137
2. — Nothing either in the statute or by-laws contemplates that such stock shall become preferred stock in the sense that such stock shall be entitled to preferment in the distribution of assets at dissolution, or that its holders shall become general creditors

INSOLVENCY—*Continued.*

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of the association as distinguished from stockholder members.

*Id.* ..... 137

3. — Neither are the holders of stock on which notices of withdrawal have been given entitled to preferment in such case. *Id.*, 137

4. — The only equitable plan for distribution of the assets of such association is the *pro rata* division of the assets among all of the stockholders, giving to each share of stock a value, for purposes of distribution, of the amount paid on it. *Id.*..... 137

INSPECTION OF DOCUMENTS—1. It is the practice of the court of chancery, arising out of its general jurisdiction for the purpose of discovery, to allow a party to apply before the hearing of a suit, for the inspection of documents, relevant to the matters in question, which are in the possession or power of the opposite party; and this discovery is allowed to a defendant, when necessary to enable him to complete his defence: but it is not unlimited, and will be extended only to such documents as appear to be necessary for the purpose of enabling the suitor to plead properly. *COPPER KING v. ROBERT.*..... 251

2. — The circumstance of the documents being abroad is no answer to an application for their production; but, in such a case reasonable time will be given the party to bring them into the state, and refusal to comply with the order will be considered the same as if the documents were here and the party refused to produce them. *Id.*..... 251

INSURANCE. LIFE—1. The interest of a person designated as beneficiary of an industrial life policy is a vested property right, subject to the terms of the policy, construed as applying to such vested right. *METROPOLITAN INS. CO. v. CLANTON.*..... 4

2. — The fact that by the practice of the subordinate officers of a life insurance company, who received and forwarded to the company a notice of change of beneficiary, the policy was not forwarded with it, as required by a printed condition on the back of the policy, and that an endorsement on the policy of the change of beneficiary, likewise required, was not supposed either by insured or by them to be necessary, will not avail to change the beneficiary, and divest the right of the personal representative of insured to the payment expressly provided for in the policy. *Id.*..... 4

3. — A gift may be made of a policy payable to the representatives of insured, as of other choses in action. *Id.*..... 4

4. — The term "beneficiary," as used in insurance, means such person as should stand in the capacity of the beneficiary according to the established course of the insurance business of the

INSURANCE, LIFE— <i>Continued.</i>	PAGE.
company with its policyholders when the policy becomes payable. METROPOLITAN LIFE INS. CO. v. HOOPPEL.....	94
5. — The rule that, where a life insurance policy payable to a specified beneficiary had been in force for several years and the beneficiary is changed, the original beneficiary is entitled to receive from the proceeds the value of the policy at the time of the change. does not apply to industrial insurance. <i>Id.</i> .....	94
6. — An industrial policy and the application made a part thereof provided that the company would pay the person designated in the fifth condition therein set forth on receipt of proofs of death, &c., a stipulated sum. The fifth condition, however, did not contain a specification of the beneficiary, but only an enumeration of persons, to any one of whom the company might pay the sum stipulated in the discharge of its obligation, provided in support thereof the company could subsequently produce the policy and a receipt for the amount paid, signed by the party receiving it. The application, however, designated the insured's husband as beneficiary, and it was the company's custom to permit policyholders to change the beneficiary; it providing a printed blank for that purpose.— <i>HEN.</i> , that the original beneficiary designated in the application had no vested interest in the insurance during the life of the insured, and, she having changed the beneficiary in accordance with the company's custom and appointed another, the latter was entitled to the entire proceeds of the policy. <i>Id.</i> .....	94
7. — An assignment by insured of a life policy payable to her children, if they survived her, which they did, otherwise to her estate, was ineffectual against her children, who alone could assign their interest. SULLIVAN v. MARONEY.....	104
8. — A life policy being made payable to certain beneficiaries, their interest can be divested in favor of other beneficiaries only in the manner provided by the policy for such a change; so that, the method provided by the policy for change of beneficiaries not being pursued in any respect, an instrument, in form simply an assignment, signed by insured, to whose estate the policy was payable only if her children, the beneficiaries, did not survive her, which was not the case, could not change the beneficiaries. <i>Id.</i> .....	104
9. — The rights of parties between themselves as to the proceeds of a life policy, depending on whether there was a change of beneficiaries, are not affected by the insurance company not contesting the question of change of beneficiary, but admitting its liability to some one. <i>Id.</i> .....	104



## J.

JOINT ADVENTURE—*See* PARTNERSHIP.

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**JUDICIAL SALES**—1. The only office of a written objection to the confirmation of a sheriff's sale in foreclosure, under act March 12th, 1880 (*Gen. Stat. 1895 p. 2111 § 45*), and court rule 205, is to urge the overthrow of the sale on the sole ground that the property did not bring the highest and best price obtainable, and an attack on the sale on any other ground must be made the basis of an independent action by bill or petition, and any effort by the purchaser to be relieved of his purchase must be by an independent proceeding, and may be by petition filed before the date fixed for the confirmation of the sale. *CROPPER v. BROWN*, 406

2. —The court, on the hearing of the petition by the purchaser at a mortgage foreclosure sale to be relieved of his purchase, filed before the date fixed for the confirmation, must treat the sale as if it were, or were about to be, confirmed in the absence of anything to show that the property did not bring the best price obtainable. *Id.*..... 406

3. —A purchaser at a judicial sale is invested with a definite legal right, recognized and enforced by law, and of which he cannot be deprived except on some legal or equitable ground, and in those cases in which confirmation is required the right is subject to be defeated by the court's refusal to confirm. *Id.*.... 406

4. —Where the judicial officer observes proper legal formalities at a judicial sale, and strikes off the property to a purchaser, who thereupon signs the conditions of sale, thereby entering into a contract to purchase the property at the price named, the situation is the same as if the contract were between private parties voluntarily entering into a contract of sale and purchase. *Id.*..... 406

5. —A sheriff's deed of land sold at a judicial sale relates back to the time of the contract of purchase entered into by the purchaser on the officer striking off the property to him at a public sale, though the deed is not to be delivered at once, and though the purchaser is not entitled to possession until he secures his deed. *Id.*..... 406

6. —The legal title does not vest in the purchaser at a judicial sale until the delivery of the deed, and in the meantime the property is held in trust for him, and the beneficial ownership of the property is vested in him, so that any increase or decrease in value inures to him. *Id.*..... 406

7. —The purchaser at a judicial sale, who on the acceptance of his bid executes a contract to purchase on the conditions of the

JUDICIAL SALES—*Continued.*

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sale, acquires thereby an equitable interest in the property, so that a loss occasioned by the destruction of a building on the land occurring thereafter, and before the confirmation of the sale, falls on him. *Id.*..... 406

JUDGMENTS—*See* HUSBAND AND WIFE; DIVORCE, 4-8.

JUDGMENTS, UNSATISFIED—1. Under *P. L. 1902 p. 534 § 70*, respecting unsatisfied judgments at law, defendant's dower right is applicable to the payment of the complainant's judgment against her. *SCHUHARDT v. WITCKE*..... 199

2. — So, also, is a certain sum of money deposited in a trust company in a special account credited "A. Conrad, Trustee for Katie Wiltske" (the defendant), the same being the avails of a check which she received from a fraternal or beneficial order of which her husband was a member at the time of his death. *Id.*..... 119

JURISDICTION—1. Equity has jurisdiction to protect and enforce legal rights in real estate, which defendants deny, if the court finds that the right exists and that complainant has not an adequate remedy at law or the threatened damage is irreparable. *KIERNAN v. JERSEY CITY*..... 114

2. — Where complainants claimed title to land which defendant city alleged was a duly dedicated street, they could not maintain a suit to enjoin defendants from laying sewer pipe in the street, complainant's remedy by ejectment being adequate and the damages not being irreparable. *Id.*..... 114

3. — As a general rule equity will entertain a bill to restrain the enforcement of a judgment for a new trial in an action at law only when the grounds on which the new trial is sought are not cognizable by the court in which the judgment was recovered. *STEIN v. CUFF*..... 277

4. — A party in an action at law, who applies therein for a new trial on grounds cognizable by a court at law, and who is defeated, cannot afterward be heard on the same matter in a court of equity. *Id.*..... 277

5. — The court of chancery has no jurisdiction to interfere with a judgment of a court of law except where some well defined independent equitable ground exists for restraining the enforcement thereof. *CLARK v. BOARD OF EDUCATION OF BAYONNE*... 326

6. — That an unsuccessful litigant in a court of law has appealed therefrom and is meanwhile unable to secure from any law court a restraint against further proceedings under the judgment below, is not an independent equity which gives the court of chancery jurisdiction to interfere, although such pro-

## JURISDICTION—Continued.

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- ceedings under the judgment may result in such a change in the status of the subject-matter of the controversy as may make nugatory a judgment of the court of review when pronounced. Overruling *People's Traction Co. v. Central Passenger Railway Co.*, 67 N. J. Eq. (1 Robb.) 370. *Id.*..... 326
7. — An application for a stay is a mere step in procedure to be applied in the exercise of an equitable discretion by the court having control of the law action and by that court only. *Id.*... 326  
See ORPHANS COURT.
8. — Upon a bill by the complainant against the executors of a testator and others, not for the specific performance of any contract, but for compensation or damages on account of the breach of a contract alleged to have been made by the testator whereby he legally bound himself to provide, by will or otherwise, for the accession by the complainant, upon the testator's death, to a parcel of his real estate and a large share of his remaining estate—*Held*, that the rights, legal or equitable, asserted by the complainant, must be based upon a contract made by the complainant with the testator and that the testator's will is not in litigation, and *held*, after examination of the evidence, that no such contract was proved. *VAN HORN v. DEMAREST* ..... 386
9. — When property is transferred, or services rendered, upon the understanding that compensation is to be rendered therefor through a legacy or devise, the value of what has been so supplied is generally recoverable in an action at law. *Id.*... 386
10. — Where the decree of this court, on its face, will be within its jurisdiction (i. e., involve no proceeding foreign to the court, and grant no remedy with which the court is not equipped), it is generally safe for the court to retain the bill and proceed to decree, even though the whole case has turned out to be strictly cognizable at law, provided, as here, no objection is made by the parties to the litigation, and any right of trial by jury has been waived, and provided further, that the court, for its own protection, does not feel called on to dismiss the bill at the end of the hearing. *Id.*..... 386
11. — Where the jurisdiction of courts of law and equity for the redress of frauds is concurrent, equity should entertain the cause and determine it on its merits, provided adequate relief cannot be obtained at law. *SCHOENFELD v. WINTER*..... 511
12. — A bill to rescind a contract relating to the sale of personal property under a lease, alleging that the contract was induced by representations which were false and which the defendant knew were false, though stating facts sufficient to support a common-law action for deceit, is cognizable in a court of equity. *Id.*... 511

## JURISDICTION—Continued.

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13. — An upper riparian proprietor unlawfully depriving a lower proprietor of the waters of the stream may not, in the absence of any contract between the parties or equity or obligation, maintain a bill to restrain the lower proprietor from suing at law for past damages to ascertain the extent and character of the upper proprietor's violations and to award damages therefor merely to prevent a multiplicity of actions, and because the lower proprietor made no complaint for two years during which the upper proprietor unlawfully took water from the stream. *STOUT v. PORTLAND CEMENT Co.*..... 518

## L.

LABOR UNIONS—See STRIKES AND BOYCOTTING.

- LACHES—Laches which does not prejudice the defendant, but injures only the complainant, cannot defeat the suit. *JOHNSTON v. MCKENNA*..... 217  
See BUILDING AND LOAN ASSOCIATIONS. 8; NOTICE, 3.

LAW OF THE CASE—A party in an action at law who accepts the decision of the supreme court that his remedy is in equity, instead of taking the opinion of the court of errors and appeals thereon, makes the decision the law of the case, and his right to sue in equity is not defeated by a subsequent decision of the court of errors and appeals in a similar case establishing the rule that the remedy is at law, though the decision may control as to the amount of the recovery. *CAMPBELL v. PERTH AMBOY MUT. LOAN, & C., ASSO.*..... 348

LEGACIES—A specific legacy carries with it the income thereof from the death of the testator. *ALLEN v. ALLEN*..... 245

LIMITATIONS, STATUTE OF—See BUILDING AND LOAN ASSOCIATIONS. 7.

LUNATICS—1. Since the statute of Edward III., conferring a right to traverse a lunacy inquisition, has never become a part of the law of New Jersey, such traverse will only be allowed in the exercise of judicial discretion. *IN RE HANNAH*..... 238

2. — The son of the subject of a lunacy inquisition has an actual *bona fide* interest therein entitling him to intervene to protect the parent. *Id.*..... 238

3. — A traverse of a lunacy inquisition is only available on an allegation that lunacy has been untruly found and cannot be availed of so as to obtain the release of a lunatic on the ground that he has recovered sanity. *Id.*..... 238

## LUNATICS—Continued.

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4. — Under act of April 2d, 1898 (*P. L. 1898 pp. 220, 221*), as amended by act of June 12th, 1906 (*P. L. 1906 pp. 679, 681*), providing that insane persons shall be confined until restored to reason or removed or discharged according to law, the authorities in charge of an insane asylum should release a person committed from confinement on his restoration to reason. *Id.*..... 238
5. — Where a person committed to an insane asylum is restored to reason, and the authorities refuse to discharge him, he may be enlarged on *habeas corpus* sued out of the chancery or common-law court under act of April 2d, 1898. *P. L. 1898 p. 231. Id.*... 238

## M.

## MARTIN ACT—See TAXES.

- MECHANICS' LIENS—1. An assignment of money due a sub-contractor from the contractor for the construction of a municipal improvement did not give to the assignee any lien on the funds in the hands of the city to the credit of the contractor, under act of March 30th, 1892 (*P. L. 1892 p. 369*), providing for the attachment of such lien, until the sub-contractor had given the statutory notice required to perfect his own lien. *NATIONAL FIRE PROOFING CO. v. DALY*..... 35
2. — Creditors of sub-contractors for the construction of municipal improvements are entitled to a lien on the moneys due the contractor in the hands of the city under act of March 30th, 1892 (*P. L. 1892 p. 369*), giving such lien in favor of sub-contractors, their assigns, or legal representatives, &c. *Id.*..... 35
3. — Materialmen having furnished materials to a sub-contractor for the construction of a municipal building did not disable themselves from acquiring a statutory lien on money in the hands of a city applicable to the contract by taking an assignment of the sub-contractor's claim against the contractor. *Id.*..... 35
4. — Where a notice of a materialman's claim for a lien on money due the contractor for the construction of a municipal building for materials furnished a sub-contractor had appended a copy of the contract between such materialmen and the sub-contractor containing the terms, time, and conditions of the agreement as required by act of March 30th, 1892 (*P. L. 1892 p. 370 § 2*), the notice contained a sufficient statement of the terms of the contract. *Id.*..... 35
5. — Act of March 30th, 1892 (*P. L. 1892 p. 369 § 1*), gives a lien on money due a contractor for the construction of a city building to sub-contractors, materialmen, &c., on their compliance with section 2, which requires the service of a verified statement showing the amount of the claim, that the materials were fur-

MECHANICS' LIENS—*Continued.*

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- nished to the contractor, and that they were actually used in the erection and completion of the contract with the city.—*Held*, that where a notice of a lien recited that there was due claimant from D., sub-contractor for the mason work on public school No. 9. \$6,630.49 for materials supplied in accordance with the contract between claimant and D., all of which had been fully completed, and the affidavit recited that there was due and owing claimant from D. \$6,630.49 for materials supplied on and about the construction of public school No. 9. in the city of Hoboken, the statement sufficiently averred that the materials were actually used in the erection and completion of the school under the contract with the city; the word "supplied" being used there in the sense of "furnish" and the word "about" being taken to mean "upon." *Id.*..... 35
6. — Where notice of a corporation's claim of lien on funds due the contractor for a public building for materials furnished a sub-contractor recited the state, under the laws of which the corporation was incorporated, it sufficiently stated the corporation's residence as required by act of March 30th, 1892 (*P. L. 1892 p. 370 § 2*). *Id.*..... 36
7. — Where the affidavit attached to a notice of a claim for a lien against the unpaid price of a public building contained no general verification, but merely asserted that the statement inclosed was a true account of the material furnished, together with the dates when the same was furnished, and the prices thereof as it appeared by the claimant's books, there was no verified statement of the terms and conditions of the claimant's contract required by act of March 30th, 1892 (*P. L. 1892 p. 370 § 2*), in order to perfect a lien, though the claim contained a statement of such facts. *Id.*..... 36
8. — Act of March 30th, 1892 (*P. L. 1892 p. 370 § 2*), declaring that before the whole work is completed the claimant may file with the city's financial officer, notices stating the claimant's residence, verified by his oath or affirmation and stating the amount claimed, from whom due and if not due, when it will be due, the amount demanded, after deducting all credits and offsets, with the name of the person by whom employed or to whom the materials were furnished, and the terms, time given, conditions of his contract, and that the materials were furnished and actually used in the completion of the contract, did not mean that a verified notice stating the claimant's residence should be filed, and that another unverified statement reciting the additional facts should be filed, but that the claimant should file a single statement in which all the requisite facts should be verified. *Id.*..... 36
9. — Where a materialman's affidavit for a lien on funds due a contractor for a public building had attached thereto a paper

MECHANICS' LIENS—*Continued.*

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- styled "invoice" which, in addition to a recital of the date, kind of material furnished, and the prices, contained the words "Terms net 30 days. Goods f. o. b. New York," the claim contained a sufficient statement of the terms, time given and conditions of the materialman's contract as required by act of March 30th, 1892 (*P. L. 1892 p. 370 § 2*). *Id.*..... 36
10. — Act of March 30th, 1892 (*P. L. 1892 p. 370 § 4*), provides that no lien shall be binding unless an action is commenced within ninety days; section 6 authorizes the claimant to enforce his claim by a civil action, and section 7 declares that the plaintiff must make all parties who have filed claims parties defendant, and that the court may decide as to the extent, justice, and priority of the claims of all the parties to the action.—*Held*, that a claimant was not required to bring suit to establish his lien within ninety days, where he had been made a party to a similar suit by another claimant. *Id.*..... 36
11. — Such section further declares that no lien shall be binding unless a notice of pendency be filed with the financial officer of the city, township, or other municipality.—*Held*, that, while only one *lis pendens* need be filed, if it gives the required information, a notice was insufficient to protect the lien of one of several claimants where it contained no reference to such claimant or its alleged lien. *Id.*..... 36
12. — Under act of March 30th, 1892 (*P. L. 1892 p. 370 § 4*), each claimant is not required to give separate notice in case his claim is specified in the notice of another claimant, yet each may give notice, and, if he does so, his notice will protect his own claim and those of others mentioned therein. *Id.*..... 36
13. — A materialman's notice of suit to enforce a lien on funds due a contractor for a public building required by act of March 30th, 1892 (*P. L. 1892 p. 370 § 4*), was not defective because it was in the form of a letter, instead of a paper entitled in the cause. *Id.*..... 36
14. — The Bankruptcy act of July 1st, 1898 (*P. L. 1898 ch. 541 § 1; 30 Gen. Stat. pp. 544, 545; U. S. Comp. Stat. 1901 p. 3418*), does not invalidate liens of sub-contractors, materialmen, &c., on funds due the contractor for the construction of a public building created by act of March 30th, 1892 (*P. L. 1892 p. 369*). *Id.*..... 36
15. — Notice to the city of the assignment of a contractor's claim against it for money due under the contract was not essential to the validity of the assignment as against a sub-contractor's lien subsequently filed under the Municipalities Lien Law act of March 30th, 1892 (*P. L. 1892 p. 369*), the statutory lien having only the effect of an attachment lien, and the lienor being in no

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better position than the debtor. <i>U. S. FIDELITY &amp; GUARANTY CO. v. NEWARK.</i> .....	230
16. — The board of street and water commissioners of a city of the first class being a joint party with the city to a contract for the construction of a reservoir, and having supervision of its performance, and power to draw upon the city for payment therefor under act of March 28th, 1891 ( <i>P. L. 1891 p. 249</i> ), notice to it of the assignment by the contractor of money due under the contract by its adoption of a resolution permitting the assignment and notice to the mayor who approved such resolution was notice to the city. <i>Id.</i> .....	230
17. — The consent of the city to the assignment by a contractor of money due under the contract was not essential to the validity of the assignment as against the subsequent statutory liens of sub-contractors, notwithstanding a provision in the contractor's contract with the city prohibiting an assignment without the city's consent; such provision being for the city's protection and not for the benefit of sub-contractors, &c. <i>Id.</i> .....	230
18. — A provision in a subcontract that it was made with reference to the contractor's contract with the city, which applied to the subcontract, except where otherwise provided therein, could not be invoked in an action by the sub-contractor against the city to enforce a statutory lien; the city not being a party to the subcontract, and its rights not being affected thereby. <i>Id.</i> .....	230
19. — When a sub-contractor sued a city to establish a statutory lien without knowledge of the contractor's assignment of the money due it under the contract, costs will only be allowed the intervening assignees from the filing of the answer upon judgment for them. <i>Id.</i> .....	230
20. — Where a building was commenced before the execution of a mortgage on the property, valid lien claims have priority over the mortgage. <i>FEDERAL TRUST CO. v. GUIGUES.</i> .....	497
21. — Where a hardware materialman's contract required complete delivery for thirty days before payment on an architect's certificates, and the materialman, on visiting the property to make the final delivery, found considerable of the hardware furnished scattered throughout the second story of the building, whereupon he collected such material, refinished part of it, and delivered it with the final installment to the architects, but did not obtain a certificate from them until after they had been discharged by the owner, there was no sufficient delivery to constitute a compliance with the contract so as to entitle him to a lien. <i>Id.</i> .....	497



MECHANICS' LIENS—*Continued.*

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22. — An action will not lie to recover moneys due on a building contract providing for an architect's certificate as a condition precedent, unless the certificate is produced or its production excused by the evidence. *Id.*..... 497
23. — A mechanics' lien claimant, having contracted to finish the plumbing, gasfitting and metal work of a dwelling-house for \$2,950, completed the work, except connecting the kitchen range, on September 25th, 1907. The owner did not furnish the range until March, 1908, whereupon claimants, on March 25th, connected it by the services of two men for four hours, their lien claim being filed June 25th, 1908.—*Held*, that the work done on March 25th was not trivial, but a substantial portion of the contract required to complete the same, and was therefore sufficient to start anew the time within which claimant was required to file his claim. *Id.*..... 497
24. — The testing of the plumbing, gas, and metal work in a building to ascertain whether it was properly done was a part of the contract for which no charge could be made for extra work. *Id.* ..... 497
25. — Where a member of a firm of architects employed to supervise the construction of a building visited the premises at a time when no work was being done, and had not been done for two or three months, the visit was insufficient to keep the architect's lien for services alive. *Id.*..... 497
26. — Where an architect visited the premises on which a building he was supervising was being erected to take care of the place, and see that things were safe and to serve notice on the contractors to finish their work, if anyone was working, such acts were within his duties as architect, and were sufficient to start a new period for filing the lien. *Id.*..... 497
27. — Where the carpenter contractor for the construction of a building always stood ready to finish the work, but was not permitted to do so, both because of a difficulty between the owner and the architects and their subsequent discharge, and the fact that the contractor could not work under the detailed drawings submitted, and also because of the owner's financial embarrassment, the contractor's failure to complete the work and to furnish an architect's certificate, as required by the contract, was no objection of his right to a lien. *Id.*..... 497
28. — Where property covered by a mortgage consisted of a dock lot used by the owner as a landing place for his yacht and separated from the mansion-house, also mortgaged, by a public highway, the house lot being bounded on three sides by a street, lien claims for labor and materials furnished in the construc-

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tion of the house would be regarded as liens on the house and lot only as against the mortgage. *Id.*..... 497

29. — The Mechanics' Lien law (*P. L. 1898 p. 546 § 21*), declaring that when the curtilage of a lot on which a building is erected shall not be surrounded by an enclosure separating it from adjoining lands of the same owner, then the lot on which the building shall extend shall be such tract as in the place of its location is designated as a building lot, &c., but in no case to exceed one-half acre, had no application to lien claims for work and materials on a mansion-house located on a lot bounded on three sides by public streets and on the other by the property of an adjoining owner and separated from a water lot, which the owner used as a landing place for his yacht, by a public street. *Id.*..... 497

30. — Where several mechanics' lien claims for labor and material performed in the construction of a building were all of one character, and there was nothing in the circumstance which would authorize priority of one over the other, they were all of equal rank. *Id.*..... 497

MORTGAGES—1. In the foreclosure of a purchase-money mortgage which has been given to a vendor by the vendee mortgagor for all or a part of the consideration of a deed of conveyance for the same premises containing covenants of warranty of title or against encumbrances, the vendee mortgagor may be allowed a deduction, by reason of the covenant against encumbrances contained in the deed, for prior mortgages, taxes, assessments or judgments; relief may also be given the vendee mortgagor by reason of the covenant of title contained in the deed if there has been an eviction by title paramount; relief may also be given in such case for fraud; or for the conveyance of less land than bargained for; the foreclosure may also be arrested pending an action at law to try the title of an adverse claimant. No relief can be given the vendee mortgagor on his assertion of an outstanding title when there has been no eviction and no action is pending to enforce it; in such case the vendee mortgagor will be left to his remedy at law on the covenants. *REDROW v. SPARKS*..... 133

2. — A defect of title which has been removed before final hearing and which has caused no damage to the vendee, affords no ground for relief of the vendee mortgagor in a suit to foreclose a purchase-money mortgage. But in such case partial relief may be given against costs. *Id.*..... 133  
*See FORECLOSURE SUIT.*

MULTIPLICITY OF SUITS—*See JURISDICTION, 13.*

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- NAVIGABLE TIDEWATERS**—1. The State of New Jersey is the owner in fee of all the lands below high-water mark in navigable tidewaters and arms of the sea within its borders in virtue of its sovereignty as successor to the king of England; and such ownership extends from ordinary high-water mark to the centre of the Kill von Kull, which is the boundary line between the States of New Jersey and New York. *ATTORNEY-GENERAL v. HUDSON COUNTY WATER CO.*..... 543
2. — The provisions of section 10 of the act of congress of March 3d, 1899, commonly called the River and Harbor act, were designed to protect the navigable waters of the United States (including the Kill von Kull) from encroachment and from obstructions to navigation, and to commit the duty of their protection to an officer of the federal government, without whose permission no such obstructions can be made. The act is a mere regulation for the benefit of commerce and navigation, and the license or permission of the secretary of war is only a finding and declaration that a proposed structure or excavation would not interfere with or be detrimental to navigation, and is not equivalent to a positive declaration by the authority of congress that the licensee may make such obstruction or excavation without first obtaining the consent of the owner of the submerged land. It is not an enactment touching the rights of the owner of such land, and the license given to the Hudson County Water Company by the secretary of war to excavate in and lay pipes across the Kill von Kull from Bayonne, in New Jersey, to Staten Island, in New York, is a mere declaration by the official named that the proposed work will not interfere with navigation, is strictly permissive, and is not an authority to do the work in the absence of consent thereto by the State of New Jersey, the owner of the land. *Id.*..... 543
3. — The proposed excavation and laying of a pipe line through the lands of the State of New Jersey under the waters of the Kill von Kull by the Water Company without the consent of the state is an act in excess of the Water Company's corporate powers, and will be arrested by a preliminary injunction without the necessity of irreparable injury to the state's rights being shown. *Id.*..... 543
- NOTICE**—1. When facts are brought to the knowledge of one contemplating the purchase of the record title sufficient to apprise him of the existence of an outstanding claim of title, and a reasonable investigation of such facts would necessarily disclose the existence of such title, he is put on inquiry and charged with notice of the facts which a reasonably diligent investigation would have ascertained. *SCHWOEBEL v. STORRIE.*..... 466

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2. — Open, visible, notorious, and exclusive possession of land by one who is not the record owner affords notice to one who purchases the record title which puts him on inquiry, and charges him with the knowledge of those facts which a reasonably diligent investigation would have ascertained. *Id.*..... 466
3. — Where in 1891 a mistake was made in the description of the property in a deed, as also in subsequent conveyances, but one claiming under it and intervening conveyances did not know of the mistake until 1906. his suit, brought in 1909, for reformation, was not barred by laches. *Id.*..... 466

NUISANCE—1. The playing of baseball on Sundays will be enjoined if it be made to appear that the noise and disorderly conduct attendant upon the games being held forth amounts to a nuisance in the neighborhood, whereby the peace and quiet of the Sabbath is disturbed and the rest which the complainants are entitled to enjoy on that day is appreciably affected; each case must stand or fall on the question of nuisance or no nuisance, as the court of chancery has no jurisdiction to enforce, by injunction, the Sunday laws, so called. *McMILLAN v. KUEHNLE*..... 256

2. — Noises which are not nuisances on a week-day may be nuisances when made on a Sunday, if they have the effect of disturbing that quiet and rest which the citizen is entitled to have for his recuperation; and the fact that such noises are forbidden by the laws of the land (the Sunday laws) takes away any defence for the making of them on Sunday even though they be but slight. *Id.*..... 256
3. — A preliminary injunction will issue to restrain Sunday baseball playing upon the affidavits of six or seven persons residing in the neighborhood where the games are held forth, which show a case of nuisance, even though more than forty persons similarly situated swear that the noises are quite inappreciable and not at all disturbing, if there be no proof before the court that the complainants are morbidly sensitive; the case not being one turning upon the preponderance of evidence as to the extent and character of the noise so much as it does but upon the question whether the affidavits on behalf of the defendants show the affiants on behalf of the complainants to be untruthful as to the existence of the noise, and as it is notorious that many people are not disturbed by noises which affect some people similarly situated, in the absence of proof that the complainants and their witnesses are morbidly sensitive, it will be presumed that they are persons of ordinary sensibility and are truthful concerning the existence of the nuisance as to themselves. *Id.*... 256

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- ORPHANS COURT**—1. Testatrix gave her entire estate to her two sons and made them executors. The will was proved January 3d, 1907, and the executor who qualified filed in the orphans court on April 26th, 1909, an inventory showing about \$1500 cash on hand, and at the same time filed his final account. The son who did not qualify as executor was adjudged bankrupt on December 1st, 1908, and complainant was appointed trustee in bankruptcy several months thereafter and brought a suit against the executor to transfer to the chancery court the settlement of the executor's account pending in the orphans court. The bill alleged that testatrix received large amounts during her lifetime and turned over to defendant money and securities amounting to \$23,000, which property was owned by her at her death, together with other property; that defendant's relation to testatrix precluded a gift thereof to him, and complainant believed that testatrix did not dispose of such property, and it should have been in defendant's possession and accounted for as assets of the estate; that it was impossible to secure a complete accounting in the orphans court, it being without adequate jurisdiction to compel discovery of the assets of which testatrix should have died seized. Fraud by the executor, or his pecuniary irresponsibility for any failure to account, was not alleged.—*Held*, that where the chancery court and the probate court have concurrent jurisdiction, it is a matter of discretion whether the former will intervene, either before or after the probate jurisdiction has attached, and, in view of the enlarged powers of the orphans court in such cases, the complainant showed no reason why the chancery court should assume jurisdiction. **STREETER v. BRAMAN** ..... 371
2. — A creditor whose claim has been barred by a rule of the orphans court barring creditors, cannot maintain a bill in the court of chancery to draw the administration into that court, in the absence of averments in the bill showing the necessity therefor. **JORDAN v. LOGUE**..... 471
3. — Statutory rights of such barred creditor defined. *Id.*..... 471

## P.

- PARTIES**—1. Wherever a testator devises and bequeaths property for charitable uses, a residuary legatee under the will has no interest in the trust property save as one of the public, and can question the proceedings of the holder of such trust property only by bill and information preferred on behalf of himself and all others similarly interested, in conjunction with the attorney-general, representing the public, or by a class-bill making the attorney-general a defendant. **IN RE ST. MICHAEL'S CHURCH**, 524

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2. — In proceedings for the sale of lands under public statutes, which proceedings are *ex parte* and where no provision is made to let in anybody to defend, no one claiming right, title or interest in the lands may intervene in the proceedings, as such rights as he may have will not be affected by any order or decree that may be made in the premises. *Id.*..... 524

**PARTNERSHIP—1.** While a business carried on by two or more persons for a profit, with a community of interest, and a share of profits and losses, is essentially a "partnership," these requirements may exist without creating a partnership, and there can be no partnership unless the agreement contemplates an agency whereby each is the agent for the other or others. *JACKSON v. HOOPEE.*..... 185

2. — A "joint adventure" may exist where persons embark in an undertaking without entering on the prosecution of the business as partners strictly, but engage in a common enterprise for their mutual benefit; they each have the right to demand and expect from their associates good faith in all that relates to their common interests. *Id.*..... 185

3. — Though there is a distinction between a partnership and a joint adventure, they are of a similar nature, and the rules of law applicable to partnerships apply to joint adventures, and equity will wind up a joint adventure because of misconduct of one of the parties and for an accounting, and in case of disagreement either party may sue for the dissolution of the agreement, and obtain an injunction to protect his rights. *Id.*..... 185

4. — A contract establishing a joint adventure need not be express, but may be implied from the conduct of the parties. *Id.*..... 185

5. — The parties to a joint adventure must act with the utmost good faith towards each other. *Id.*..... 185

6. — Complainant and defendant, engaging in business with third persons, bought out the third persons, and then organized a corporation and carried on the business by their joint direction. They were equal stockholders in the corporation, and they managed it jointly with the aid of employees. Instead of dividends, they drew profits from the bank accounts of the business; each drawing substantially equal amounts. This corporation was liquidated and other corporations formed. They were equal holders of the stock of the new corporations; but to comply with the law a few shares were put in the names of two other persons. Defendant stated in a letter that the whole business was one concern. The receipts from the business, which was conducted in various countries, were deposited indiscriminately in the same banking accounts from which expenditures were made

## PARTNERSHIP—Continued.

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- generally. The funds received from every source were deposited in banking accounts kept in different names, but were subject to withdrawal by complainant and defendant.—*Held*, that complainant and defendant were parties to a joint adventure and were not partners. *Id.*..... 185
7. — Where a testator nominates his son as an executor, and also trustee of testator's interest in a partnership in which the son is a partner, and it is the son's duty, under the will, as executor, with the surviving partners, to determine testator's interest in the partnership, and, as trustee, to agree with the surviving partners as to the terms on which testator's interest shall remain in the business for a given period, suit against the son by the beneficiaries under the will for discovery and accounting is properly brought in chancery, and is not barred by an accounting by the executors in the orphans court. *SHEARMAN v. CAMERON*..... 426
8. — On balancing the books of a partnership of three members, it appeared that the liabilities of a former firm taken over by the existing firm exceeded the assets so taken over by a certain sum, and that sum was thereafter carried into its suspense account and never paid.—*Held*, that, in ascertaining the interest of a deceased partner, it was proper to charge that interest with one-third of such amount. *Id.*..... 426
9. — In ascertaining the interest of a deceased partner in the firm, an amount due one of the surviving partners by the deceased partner should not be deducted from the amount of the latter's interest, as in ascertaining such interest nothing can be deducted except an indebtedness to the firm. *Id.*..... 426
10. — Where executors of a deceased partner report to the orphans court a specified amount due from the firm, which is the total aggregate, less items, among which is a charge of a certain amount in favor of decedent's son, who was also a partner, and there was nothing in the account to show that the son, as an individual, claimed to be a creditor of the father's estate, the orphans court in approving the account did not pass upon the question whether the indebtedness to the son was a proper charge against the father's interest. *Id.*..... 426
11. — Where a partner by his will appoints his son a trustee of his interest in the partnership, and directs his executors to at once, upon his death, pay to his daughter an amount not exceeding \$1,000, for her immediate support, to be taken out of his interest in the partnership, and the executor's account filed in the orphans court showed that up to a date specified they had paid the daughter \$704.40, and the trustee's account, filed in the chancery court, claims credit as if the daughter had received \$1,000, the trustee is only entitled to a credit for \$704.40. *Id.*.. 426

PARTNERSHIP—*Continued.*

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12. — Where the will of a deceased partner directed the trustee of his interest in the partnership to pay quarterly "from and after my death" certain annuities out of the income, the annuities should be paid from the date of his death, although by the terms of the will his interest in the partnership was to be determined as of a date three months subsequent to the date of his death. *Id.*..... 426

13. — If a trustee invests money in unauthorized securities, the *cestui que trust* is entitled to the profits; and where a partner leaves his interest in the partnership by will to another partner in trust, and directs that such interest remain in the business for a specified time from a certain date next succeeding his death, on such terms as the trustee may think just, and after that date to be invested according to the trustee's best judgment, and the trustee allows the interest to remain during the five-year period at an agreed rate of ten per cent., if the trustee allows the trust fund to remain in the partnership after the period specified, he should be held to account for it at the same rate. *Id.* ..... 426

14. — Where a son is executor of the estate of his mother, and receives a certain sum from the sale of property held jointly by the father and mother, which amount is charged to him as executor, and he permits his father to take and keep the money, and he is subsequently appointed executor of his father's estate, it is proper for him to charge such amount against the father's estate. *Id.* ..... 427

15. — An interest of a deceased partner was continued in the business at an agreed rate as to profits.—*Held*, that no charge should be made against the executors, the surviving partners, or the trustee appointed by the deceased partner's will to hold his interest in the business on account of the good will, as such interest continued to receive the benefit of the good will. *Id.*.. 427

PATENTS—1. A representation by a patentee that a certain thing is covered by his patent, made in good faith while bargaining with another as to a license, is not a representation of a fact on which the latter may rely, so that he cannot, on subsequently proving the falsity of the representation, repudiate the license. *FERRY-HALLOCK Co. v. PROGRESSIVE PAPER BOX Co.*..... 2

2. — A licensee who uses a patent is estopped from denying the licensor's title. *Id.*..... 2

3. — A licensee under a patent, who for fraud or otherwise has the right to repudiate the license, cannot repudiate it in part and claim under it in part. *Id.*..... 2

PERPETUITIES—*See* CHARITABLE TRUSTS.



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PLEADING—1. Defendant in equity is bound by admissions in his answer without oath. <i>HAGERMAN v. BROWN</i> .....	126
2. — In a suit by one administrator against his co-administrator for the recovery of money alleged to be due complainant from intestate in his lifetime for services rendered and merchandise supplied, and also for the recovery of money paid by complainant for funeral expenses, upon a motion to strike out such portions of the bill as refer to such matter on the ground (1) of uncertainty, and (2) because within the jurisdiction of the orphans court, respectively— <i>Held</i> (1) that as the bill primarily seeks to establish a debt from the intestate to the complainant as administrator, which is disputed by his co-administrator, the suit is properly brought in this court; and (2) as respects the claim for services and merchandise the rules of equity pleading require complainant to give defendant full information in such a manner as to apprise him of the times when and the nature of the labor performed, and the kind and extent of the merchandise delivered, and when delivered, these being matters peculiarly within the complainant's knowledge, and of which defendant is presumptively ignorant. <i>MULLER v. MULLER</i> .....	158
3. — Since rule 213 was adopted a motion against a bill for uncertainty is entertained of the same force as a demurrer upon like ground. <i>Id.</i> .....	158
4. — When jurisdiction is conferred by statute upon this court without provision made for the kind of pleading by which the power of the court is to be invoked, a bill of complaint is the proper method of procedure. <i>SALEM v. STATE</i> .....	264
5. — A person or corporation aggrieved by a finding of the state board of health concerning water pollution under section 1 of the supplement to the State Sewerage Commission act of May 7th, 1907 ( <i>P. L. 1907 p. 360</i> ), may "appeal" to this court by bill of complaint according to the established practice of the court. <i>Id.</i> , 264	264
6. — If a defendant submits to answer he must answer fully, and an answer that the defendant denies all of the matters set forth in a certain paragraph of the complainant's bill is insufficient. Each material allegation of fact charged must be answered not only as to the defendant's knowledge of each fact, but, if he has no knowledge, then as to his information and belief regarding it, if he has any. <i>Id.</i> .....	264
7. — An application to withdraw an answer represented to have been improperly and inadvertently filed, will be denied unless it be shown that the answer was filed through mistake or under a misapprehension of the defendant's rights. <i>Id.</i> .....	264

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## Q.

- QUIETING TITLE—1. Under the act of March 2d, 1870 (*Gen. Stat. p. 3486*), a party who is in peaceable possession of lands, claiming to own the same, where his title is disputed, may maintain a suit in chancery to settle the title, where no suit to test the validity of the title is pending, notwithstanding it appears on the preliminary hearing as to jurisdiction that he claims under a conveyance from the executors under a will of one to whom, before the conveyance, he bore the relation of tenant. *MERCHANTVILLE FIELD CLUB v. WELLS*..... 295
2. — A party claiming to be in peaceable possession of lands, claiming to own the same by virtue of a conveyance to him from the executors under a will, is not required to prove the due execution of the will in order to confer jurisdiction upon the court of chancery to retain his suit under the act of March 2d, 1870. *Gen. Stat. p. 3486. Id.*..... 295

## R.

- RAILROAD COMPANY, RELIEF DEPARTMENT—1. Though the scheme of a railroad company organizing an association for the benefit of its employees to establish a fund to pay death benefits is violative of the General Insurance law, it does not affect the contract between the railroad company and an employee, but the contract, in the absence of legislation on the subject, is enforceable. *WOLFSTERN v. PENNSYLVANIA RAILROAD Co.*..... 78
2. — Where the bill by the parents of a deceased member of a benefit association composed of the employees of a railroad company, organized by it for the establishment of death benefits, against the person designated by the employee as beneficiary, alleges that the object of the association was the establishment and management of a fund for the payment of death benefits, and sets forth only two of the regulations of the association and a part of a third, any doubts arising as to the legal or equitable rights of the parties, on account of the difficulty of discovering the terms of the contract because of the failure to set forth all the regulations, must be resolved in favor of defendant. *Id.*.... 78
3. — A railroad company organized an association for the establishment and management of a fund for the payment of accident, sick and death benefits. The dues payable by the employees of the railroad company were taken from their wages as a volun-

RAILROAD COMPANY, RELIEF DEPARTMENT—*Continued.* PAGE.

tary contribution. The railroad company agreed absolutely to pay the benefits according to the contract, in consideration of the payments made by the employees, whether such payments were sufficient or not.—*Held*, that the fund created, though deemed a trust fund for the benefit of the employees and their beneficiaries, could not be controlled by the employees, except possibly in equity to prevent a diversion of the fund or to secure an equitable distribution thereof on the winding up of the scheme. *Id.* ..... 78

4. — A railroad company organized an association for the benefit of its employees, to establish a fund to pay accident, sick and death benefits. An employee desiring to become a member had to apply therefor and designate the beneficiary to whom the death benefit should be payable, and the beneficiary so named, on the approval of the superintendent, was entitled to the death benefit, provided good reasons were given for the designation. An employee applied for membership, and designated one as beneficiary whom he described to be his wife. The designation was approved.—*Held*, that the beneficiary so designated, though not the wife of the employee, was entitled to the death benefit as against the employee's parents. *Id.* ..... 78

RAILROAD CROSSINGS—1. Where a railroad company was required to maintain a proper passageway under its tracks at a crossing, a bill to compel the railroad company to enlarge such passage to provide for increased traffic, &c., must be regarded as a bill, not to abate a nuisance in a public highway or for the determination of easements, but as only invoking the chancery jurisdiction conferred by the General Railroad act (*P. L. 1903 p. 660 § 29*), providing that, when a railroad company shall not properly construct and maintain crossings of highways by its railroad tracks as required by law, the township or municipality may proceed in equity to compel specific performance of the duties imposed by law on the company in that respect, &c. *SOUTH AMBOY v. PENNSYLVANIA R. R. Co.* ..... 57

2. — The extent of user ordinarily determines the minimum width of a highway; the extent of user not being limited, however, to the track formed by the wheels of vehicles. *Id.* ..... 57
3. — Where the public acquires a right of travel over the land of another, the public easement includes the use of such adjacent lands as may be needed for ordinary repairs and improvements. *Id.* ..... 57
4. — In order that a railroad "crossing" shall exist, the railroad and the highway must intersect each other in some degree, or at least one must be superimposed on the other. *Id.* ..... 57

RAILROAD CROSSINGS—*Continued.*

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5. — The charter of a railroad company (*P. L. 1829-30 p. 88 § 15*) required it to construct and keep in repair good and sufficient bridges or passages over the railroad or roads where any public or other road shall cross the same so that the passage of carriages, horses, and cattle on the roads shall not be prevented thereby, &c. General Railroad act (*P. L. 1903 p. 659 § 26*) makes it the duty of every railroad company to construct and keep in repair sufficient passages over, under, and across the company's right of way so that public travel shall not be impeded, &c., provided that section shall not enlarge the duty imposed by charter on any railroad incorporated prior to 1873.—*Held*, that section 26 did not enlarge the charter duties of the railroad company under which it was not required to construct an underneath crossing to the full width of the street, but was only required to construct a "passage" sufficiently large for the accommodation of the existing needs of the public. *Id.*..... 57
6. — The legislature, in the exercise of police power, may increase the burdens on railway companies in respect to highway crossings. *Id.* ..... 57
7. — Where a railroad was not constructed prior to April 21st, 1873, and its charter required it to construct and keep in repair sufficient bridges or passages over its railroad where any public or other road shall cross the same, the chancery court, in a statutory action authorized by the Railroad law (*P. L. 1903 p. 660 § 29*), had power to compel the company to construct a good and sufficient passage under its road for the accommodation of travel on a street with which the road had provided an inadequate undercrossing. *Id.*..... 57
8. — Where a railroad company's charter required it to construct good and sufficient bridges or passages "over" its railroad or roads where any public highway shall cross the same, the word "over" was used in its ordinary sense to mean "above." *Id.* ..... 57
9. — Where a railroad company was required to construct and maintain an underpassage where a street crossed its right of way for a distance of two hundred and sixty-five feet covered by seventeen tracks, the railroad company was required to build and maintain a passage thirty-three feet wide and light the same either by suitable openings or artificial light, to pave the same to conform to the street, and to keep it properly drained. *Id.* ..... 57
10. — Notice to a railroad company to construct and repair an under-passage or crossing is not a condition to the maintenance of a suit to compel specific performance of the company's duty to do so under Railroad law (*P. L. 1903 p. 660 § 29*), authorizing the township or municipality by suit in equity to compel

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specific performance of the duties imposed on the railroad company with reference thereto by law. *Id.*..... 57

11. — Under Railroad law (*P. L. 1903 p. 660 § 29*), authorizing the township or municipality to proceed in equity to compel specific performance of a railroad company's duty to construct and maintain proper crossings, the county was neither an improper nor unnecessary party complainant to a suit by the common council of a borough for such relief. *Id.*..... 57

12. — On a bill filed by a city against a railroad company to compel it to effect the crossing of its present tracks across a public highway in a city in some other manner than at the grade of said street, and for this purpose to construct and keep in repair good and sufficient bridges or passages over or under the said railroad tracks as at present constructed across said highway so that the passage of carriages, horses and cattle upon the street shall not be impeded thereby, and for further relief—*Held*, that the court of chancery correctly decided that the facts of the case did not warrant so drastic a remedy as track elevation or depression, but that it was unnecessary to determine whether the court of chancery had jurisdiction to order tracks to be elevated or depressed, and therefore that question is not passed upon or decided. *NEWARK v. ERIE RAILROAD CO.*..... 317

13. — The relief afforded by a decree must conform to the case made out by the pleadings as well as the proofs, and that granted under the general prayer must be *secundum allegata et probata*. *Id.*..... 317

14. — Whether the court of chancery has jurisdiction or power to order railroad tracks crossing a highway to be removed therefrom, if they render the highway crossing dangerous for public use, on the ground that they have been illegally laid in such highway, is not passed upon or decided. *Id.*..... 317

**REFORMATION OF CONTRACTS**—A contract embodied in a letter written by the complainant to the defendant in compliance with defendant's request purporting to contain a memorandum of the terms of an oral building contract between the parties, theretofore entered into between them, but which did not correctly embody the terms of the real contract owing to the mistake of the complainant, will be reformed, where it appeared that the defendant either did not observe the error in the writing, and hence the writing embodied a mistake on his part, or did observe the error in the writing and failed to disclose that fact to the complainant. under circumstances constituting such unconscientious or fraudulent conduct on his part as to entitle complainant to the relief of reformation. *SIMPSON PLUMBING AND HEATING CO. v. GESCHKE.*..... 475

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<b>RELIGIOUS SOCIETIES</b> —1. Evidence, in a proceeding to prevent the property of a religious society from being diverted from its original use, <i>held</i> to show that a meeting of the society, called to determine whether the society should continue to affiliate with the church organization with which it had formerly affiliated, or should connect itself with another society, was regularly called, and that all the proceedings which took place at such meeting were regular and in accordance with the course and practice of the society. <i>VARGO v. VAJO</i> .....	162
2. — Where a meeting of a religious society is held to determine whether the society shall longer affiliate with the branch of the church with which it had formerly affiliated, or shall connect itself with another, and it is unanimously decided at that meeting to connect itself with another society, and no appeal is taken from such action to any higher judicatory of the church, such action is final, and a subsequent meeting of the society cannot disturb the decision. <i>Id.</i> .....	162
3. — Evidence, in a proceeding to prevent the diversion of church property from its original use, <i>held</i> to show that the Hungarian Evangelical Reformed Congregation of Trenton is only subject to the supervision of higher church authority in ecclesiastical matters, and that it has full control over its property, and cannot be restrained from reincorporating as the Magyar Reformed Church of Trenton, and transferring its property to the latter church and loaning money and placing a mortgage on such property. <i>Id.</i> .....	162
4. — Where a meeting of a church society is regularly called and conducted, and the society determines at such meeting to terminate its connection with its superior church body and affiliate with another church, there being nothing to prevent such action in its charter, members of the society who do not agree with the majority lose any right which they may possess to bring an action to prevent the society from carrying out its resolution by failing promptly to commence an action, as laches will prevent them from securing favorable consideration in a court of equity. <i>Id.</i> .....	162
<b>RES ADJUDICATA</b> —Where an issue was not precisely raised, nor expressly decided by the court, the decision was not conclusive on the issue. <i>FERRY-HALLOCK CO. v. PROGRESSIVE PAPER BOX CO.</i> .....	1
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<b>RESCISSION</b> —The right of rescission of a contract must be asserted within a reasonable time; the retention of the benefits of the contract is inconsistent with the assertion of that right. <i>REDROW v. SPARKS</i> .....	133
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<b>RESTRAINT OF TRADE</b> —1. A contract that the covenantor will not engage in a competitive business, although a contract in restraint of trade, is not opposed to public policy but is valid and enforceable, when the restraint contracted for is partial and is reasonably required for the protection of the covenantee in the use and enjoyment of the particular business the covenantor contracts not to carry on. <i>ARTISTIC PORCELAIN CO. v. BOCH</i> .....	533
2. — It will be presumed that the parties intended to make a valid contract and that they designed to provide a reasonable restraint. <i>Id.</i> .....	533
3. — Where the restraint is without qualification it is unreasonable and contrary to public policy; but where it is subject to some qualification, either as to time or space, the question is whether it is reasonable, and, if reasonable, it is good in law. <i>Id.</i> .....	533
4. — A contract founded upon adequate consideration that the covenantor will not engage in the manufacture or sale of white porcelain door knobs, unlimited as to space, but limited as to time to a period of approximately five years, is reasonable and will be enforced by injunction. <i>Id.</i> .....	533
<b>RESTRICTIVE COVENANTS</b> —1. An action at law for damages for breach of a restrictive building covenant can only be brought against the person by whom broken, and not against a subsequent grantee. <i>ZELMAN v. KAUFHERB</i> .....	52
2. — An application for a mandatory injunction to protect a restrictive building covenant must be promptly made. <i>Id.</i> .....	52
3. — To warrant a mandatory injunction to protect a restrictive building covenant, the common scheme of building must have been actually preserved. <i>Id.</i> .....	52
4. — Adjoining owners who not only stood by while a building was erected in violation of a restrictive building covenant, but have themselves violated such covenant, are not in a position to complain. <i>Id.</i> .....	52
5. — Where the owner of land lays it out into streets and lots, and adopts a restrictive covenant regarding the location and use of buildings to be erected on the lots, with a view to secure the defined conditions named in the covenant for the benefit of the entire tract which he seeks to develop, and inserts the covenant in all deeds as a part of the defined scheme and as an exaction from all purchasers for the benefit of each purchaser, the equitable right to enforce the covenant enures to each purchaser, irrespective of the time of his purchase. <i>BOWEN v. SMITH</i> .....	456

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6. — A restrictive building covenant in a deed of platted land, providing that it was the object of the covenants to secure and perpetuate the health, beauty and general improvement of the locality, and that it was expressly agreed that such covenants should run with the land, and that any subsequent conveyance should be made subject to the same covenants, &c., was a covenant for the benefit of the remaining portion of the grantor's land. *Id.*..... 45C
7. — The record of a deed containing a restrictive building covenant was notice to all persons to whom the grantee's title subsequently passed. *Id.*..... 456
8. — The foreclosure of a mortgage, given by the grantee in a deed containing restrictive building covenants to the grantor, did not extinguish the notice given by the record of the deed that the grantee had bound himself and his heirs and assigns to the preservation of such covenants. *Id.*..... 456
9. — The equitable right to enforce restrictive building covenants may be lost by a degree of acquiescence in their violation amounting to an abandonment of the right of complainant. *Id.*..... 456
10. — A common grantor, who has parted with his title to a portion of the land for the benefit of which a restrictive covenant has been imposed on other land theretofore conveyed by him, may not thereafter release or modify the covenant so far as it operated to benefit the land previously conveyed. *Id.*..... 456
11. — Evidence *held* insufficient to show a loss by complainant of the right to enforce restrictive building covenants through failure to seek to enjoin the erection of certain buildings. *Id.*..... 456
12. — A covenant in a deed establishing a building line is valid. *Id.*..... 456
13. — Courts of equity do not aid one man to restrict another in the uses to which he may lawfully put his property unless the right to such aid is clear. *FORTESQUE v. CARROLL*..... 584
14. — Whether or not a covenant that "not more than one building shall be erected upon a single lot" is violated by the erection of a structure whose exterior walls, foundation and roof constitute it one building but whose interior arrangement and entrances show that it is to constitute two residences, is not so clear that a court of equity will aid in its enforcement. *Id.*... 584
- RIPARIAN RIGHTS—1. A riparian proprietor is entitled to have the stream discharge its waters in its natural course and in its natural way, except to the extent to which a lower riparian proprietor having constructed a dam across the channel has acquired



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a prescriptive right to interrupt the natural flow. <i>DEFIANCE</i>		
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## S.

SALE OF LANDS IN EX PARTE PROCEEDINGS—1. Where an act of the legislature provides for the sale of land in <i>ex parte</i> proceedings if it shall be made to appear that the interests of the owner thereof or of a particular estate therein will be promoted by such sale, the rights of others claiming interests in the premises will be protected by the limitation that the lands shall not be sold unless it be to the interest of such owner, as his interest protects the interest of all others claiming rights therein. <i>IN RE ST. MICHAEL'S CHURCH</i> .....		525
2. — The act of April 17th, 1905 ( <i>P. L. 1905 p. 287</i> ), amended May 15th, 1907 ( <i>P. L. 1907 p. 462</i> ), authorizing the sale of land granted or devised to religious associations, or to corporations formed or existing for the purpose of education, or to officers or trustees of such corporation, in certain cases, is prospective and not retroactive. <i>Id.</i> .....		525
		<i>See JUDICIAL SALES.</i>
SPECIFIC PERFORMANCE—1. A doubt about a title to render it not marketable must be a rational doubt, or real and not fanciful. <i>ZELMAN v. KAUFHERR</i> .....		52
2. — A court of equity, when asked to decree the specific performance of a contract, will examine not only the contract itself, but the relations of the parties and the surrounding circumstances; and if by reason of inadequacy of consideration and the other circumstances of the case, there is reason to suspect fraud, specific performance will be denied, and the complainant left to his remedy at law. <i>WORTH v. WATTS</i> .....		299
3. — In a suit for specific performance, the court should, as far as possible, settle doubtful questions of law affecting the title, and compel the vendee to take a title which the court finds free from defects so far as doubtful questions of law are concerned. <i>DESEUMEUR v. RONDEL</i> .....		394

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4. — Where the validity of a title depends on facts which are not of such a character as to be susceptible of proof at any and all times by those who may need to prove them for their protection, the title should not be forced on an unwilling vendee in a suit for specific performance. *Id.*..... 394

5. — A contract of two persons on a sufficient consideration for the benefit of a third person is enforceable against the contractor. *Id.* ..... 394

6. — An agreement between two persons on a legal consideration to dispose of their property at death in a specified manner, or to specified persons, is enforceable. *Id.*..... 394

7. — B., owning certain lots and personal property, and his wife, owning certain other lots, executed a mutual will, providing for the life use of all of the property by the survivor, and on the survivor's death that the executors should sell all the real and personal property of which the survivor should die seized and divide the proceeds into two equal parts, one for the benefit of the heirs of the husband, and the other for the heirs of the wife. B. died first, and the paper was probated as his will, after which the wife married another and conveyed all of the lots to her then husband. She thereafter died, leaving a new will bequeathing everything to her second husband, and he died leaving a will by which he devised the lots to C., who conveyed to plaintiff, who also received a deed to two of the lots originally owned by B. from his executor.—*Held*, that since the paper was signed by both parties, if based on a sufficient consideration, it might be enforceable in equity by the heirs of B. and his wife, regardless of her attempt to repudiate the same by her will. But where complainant's title to the lots depended on a question of fact, proof of which was not necessarily available to the vendee at all times, he would not be compelled to take the title in a suit for specific performance. *Id.*..... 394

STATUTE—1. An amendatory act, like other legislative enactments, takes effect only from the time of its passage and approval, and has no application to prior transactions, unless an intent to the contrary is expressed in the act or is clearly to be implied from its provisions. *IN RE ST. MICHAEL'S CHURCH.*... 525

2. — As to whether a subsequent legislative act repeals by implication a former one, the canon of construction is: If both acts can stand together both shall stand, but if they are so repugnant to each other that both cannot stand together, the former gives place to the latter. *TITLE GUARANTEE LAND CO. v. PATERSON*, 530

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- STRIKES AND BOYCOTTING—1. The case of *Jersey City v. Cassidy*, 63 N. J. Eq. (18 Dick.) 759, was examined and followed in this suit. *HALL LACE CO. v. JAVES*..... 92
2. — Where the question is whether the restraint should be continued against the labor union defendant as well as against the body of its members, and the sole objection to the injunction is that it is unnecessary, and the objection is urged because of the erroneous notion that the vacation of the injunction is a "vindication" of the defendants, who have been subjected to its operation, comparatively slight evidence of the usefulness or necessity of the injunction is sufficient to sustain it until the final hearing. *Id.*..... 92
3. — A court cannot pretend to be ignorant of facts in relation to a strike of employes in a large city within its jurisdiction, which are common to the knowledge of every intelligent person within the county. *CONNETT v. UNITED HATTERS OF NORTH AMERICA* ..... 202
4. — False statements in affidavits on behalf of defendant opposing a preliminary injunction must be held to weaken very much their evidence in other respects. *Id.*..... 202
5. — The undoubted principle of law that every man is bound by the consequences of his own acts applies to the acts of labor unions in ordering a strike and encouraging its continuance, and they must be held accountable for all the results that can properly be traced to their original action. *Id.*..... 202
6. — Acts of violence, intimidation, and coercion chargeable to local labor unions, consisting of assaults on employes by strikers and their sympathizers, assembling of mobs of such persons resulting in riots, turbulent affrays in the streets, and the organization of a system of picketing, for the purpose of annoying employes not participating in the strike, are unlawful. *Id.*.... 202

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7. — Unless bound by contract, employees may, singly or in a body, leave their employment whenever they choose, and for any reason, or for no reason at all, but when they go they have no right to interfere in the slightest degree with the efforts of the employer to fill their places; and, in like manner, the employer may discharge one or all of his employees, and, having done so, he cannot interfere in any degree with their efforts to obtain employment elsewhere. *Id.*..... 202
8. — The employer and employe have correlative rights which appear in our constitution in the clause "among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness," and there is no law applicable to the one that does not apply to the other with equal force. *Id.*..... 202
9. — The action of local labor unions in calling meetings, and in the most public and formal manner expelling members refusing to join in a strike, without according them a hearing, where they were guilty of no moral turpitude, and where, according to the by-laws, they had already lost their membership, must be regarded, in passing on the right to an injunction against intimidation of employes desiring to work pending a strike, as action taken to stand *in terrorem* as to the remaining members. *Id.* ..... 202
10. — Act of February 14th, 1883 (*P. L. 1883 p. 36*), providing "that it shall not be unlawful for any two or more persons to unite, combine or bind themselves by oath, covenant, agreement, alliance or otherwise to persuade, advise or encourage, by peaceable means, any person or persons to enter into any combination for or against leaving or entering the employment of any person, persons or corporation," has no relevancy to a civil suit to enjoin labor unions and their officers and members from unlawful acts intended to intimidate and interfere with the employes of complainants pending a strike. *Id.*..... 202
11. — Without proof that a national association of employes as a body encouraged the unlawful acts of local unions in connection with a strike ordered by them, injunction will not lie against it, but its president should be enjoined when, notwithstanding his public utterances against unlawful disturbances in connection therewith, he has encouraged the same, and is in fact in charge of the strike, and his utterances have also been at variance with those in which he counseled peace. *Id.*..... 202

STRIKING OUT PLEADINGS—1. The specification of grounds of demurrer as prescribed by chancery rule 209 is, in effect, a statement in advance of the points of law intended to be argued thereunder. *MCCARTER v. UNITED N. J. R. R. & CANAL CO.* 323

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2. — A motion to strike out assigned causes of demurrer is unwarranted. *Id.* ..... 323
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**SUNDAY BASEBALL—See** NUISANCE.

**SURPLUS MONEY—1.** Surplus money arising upon a sale of land under a decree of foreclosure stands in the place of the land itself in respect to liens upon or vested rights therein. *SERVIS v. DORN* ..... 241

2. — Surplus money, arising upon a sale of land owned by husband and wife by an estate in entirety, will not be paid to the husband and wife upon their petition when there are judgments against either one of them, but will be held under the control of the court to wait the severance of the estate by the death of one of the parties, when the fund will or will not become available in satisfaction of the judgments, accordingly as the judgment debtor survives or dies before the other tenant by entirety. *Id.* ..... 241

**T.**

**TAXES—1.** Where a testator leaving real estate dies after May 20th within any given year, his personal estate is chargeable with the payment of taxes assessed as of May 20th of that year. *SHEARMAN v. CAMFRON* ..... 428

2. — There is no repugnancy between the act of March 30th, 1886 commonly called the Martin act (*Gen. Stat. p. 3370*), and the act of April 8th, 1903, commonly called the General Tax act (*P. L. 1903 p. 394*), and therefore the latter does not repeal by implication any of the provisions of the former. *TITLE GUARANTEE & CO. v. PATERSON* ..... 539

3. — A sale of land by the city of Paterson under the provisions of the Martin act as amended by the supplement of June 2d, 1905 (*P. L. 1905 p. 497*), is valid. *Id.* ..... 539

**TRUSTS AND TRUSTEES—1.** A trustee named in a will was not disqualified to act because it was a foreign corporation. *BELL v. WHITE* ..... 49

2. — In a suit to have a resulting trust declared in land received by defendant by devise, on the ground that part of the purchase-price was furnished by complainant and title taken in testator, the rights of the parties will not be determined on the theory that the land was originally owned by complainant

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and testator as tenants in common, and as testator acquired title through purchase on a foreclosure sale, complainant could treat the purchase as a redemption, and have his rights as a co-tenant established, where the proofs were not taken on that theory. *BERLA v. STRAUSS*..... 275

3. — Under Orphans Court act (*P. L. 1898 p. 762 § 130*), authorizing the allowance to a trustee of such commission upon the income as the court deems just, provided that such allowance shall not exceed five per cent., the commission allowed may be less than five per cent., and ordinarily where the annual income is large the circumstances must be unusual in order to justify the allowance of that rate, though it may be properly allowed where the income is small. *IN RE N. J. TITLE GUARANTEE & TRUST CO.*..... 293
4. — Where a trustee has only administered an estate for seven years, during which time his only service had been to receive and disburse the income of investments already made, and the trust will probably continue for thirty or forty years longer, a commission will not be allowed the trustee on the *corpus* of the estate upon an accounting. *Id.*..... 294
5. — Where one engages to conduct, and enters into, negotiations for the purchase of lands for another, and is informed by his principal that he desires to purchase two adjoining tracts in order to make one property of them, a confidential relation arises, and the agent cannot, in equity, purchase on his own account one of the tracts and hold it against the interest of his principal, for one who undertakes to act for another may not, in the same matter, act for himself, and this rule extends to all cases in which confidence has been reposed, and applies as strongly to those who have gratuitously undertaken the trust, as to those who are to be paid for it. It is sufficient that the party undertaking the negotiations accepted and held a situation of trust in reference to procuring the land, and every man has a trust to whom a business is committed by another where his business is to advise or operate, not for himself, but for others. *ROGERS v. GENUNG*..... 306
6. — Where a testator directed his executor to pay his widow, during her life, the income derived from the investment of a certain fund which was set aside for that purpose, a portion of the principal of which was misappropriated by the trustee, and the residuary estate has been distributed to and among the residuary legatees, who are also residuary legatees of said fund, the widow cannot compel such residuary legatees to make good out of what has come into their hands the amount so misappropriated by the trustee, and which should have been paid to her by way of annual payments or income. *LISTER v. HARDIN*..... 360

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7. — Where the loss of a fund is due to waste or misconduct of the executor and trustee, he and his estate alone can be looked to. No contribution arises against residuary legatees in such a case. *Id.*..... 360
- S. — The case of *Trenton Trust Co. v. Donnelly*, 65 N. J. Eq. (20 Dick.) 119, distinguished. *Id.*..... 360

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## W.

- WAREHOUSEMAN—Under "An act concerning warehouse receipts and to make uniform the law relating thereto" (*P. L. 1907 p. 341*), a receipt or memorandum given by a warehouseman to his bailor which shows that the property described therein was received from the bailor, by the warehouseman, for safe-keeping, in the ordinary course of his business, is a sufficient warehouseman's receipt to entitle him to require his bailor and an adverse claimant to interplead and settle their respective rights to the property, although it may not embrace all of the terms set out in section 2 of the act. *N. J. TITLE GUARANTEE & TRUST Co. v. RECTOR* ..... 587

- WATER COMPANIES—A water company is not entitled to an injunction against interference with its proceeding to open streets for the purpose of laying pipes where it has not applied to the mayor of the borough for a permit as required by a borough ordinance, though the mayor and council to whom the company did apply imposed unreasonable conditions on the granting of the permit. *N. Y. & N. J. WATER Co. v. NORTH ARLINGTON*... 514

- WILLS—1. By will testatrix gave certain real property to a son, and provided that, on the son's death leaving no children, the property should go to her daughter, should the property have been sold or exchanged, the daughter should receive the value to the extent of \$4,000 and "should my daughter not be living at the time of my son's death, then the property or the equivalent to be given to my granddaughter."—*Held*, that the son took the property in fee, subject only to the executory devises, and the

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- granddaughter took a contingent interest in fee. *ROGERS v. BAILY* ..... 29
2. — At the time of making his will the testator's estate consisted of certain securities (bonds and mortgages) of which he thereafter died possessed. In the second item of his will he provided as follows: "I do give and bequeath unto my wife Georgia M. Allen, the sum of \$17,000.00, to be paid to her out of the securities which I now hold, instead of cash."—*Held*, that the legacy is a specific one, and is to be paid out of the securities which came to the executor as part of the estate of the testator. *ALLEN v. ALLEN*..... 245
3. — Lead pencil marks drawn by a testator through certain clauses of his will, with the intent *at the time* to revoke such clauses, will have that effect given to them notwithstanding the subsequent employment of the instrument so canceled as the text from which a fair copy was to be made. *FROTHINGHAM'S CASE* ..... 331
4. — A testamentary disposition contained in one writing disposing of property held jointly is a "joint will;" whereas, the same document, if it refers to and deals with property held separately, would be a "mutual will." *DESEUMEUR v. RONDEL*..... 394
5. — The court in construing a will must search for testator's intention in the light of the facts, placing itself as nearly as possible in his position. *HOWELL v. STEELMAN*..... 423
6. — Testator gave a nominal sum to each of his five children, gave the balance to his wife for life, or during widowhood, with a gift over, on her death or remarriage, to his "surviving heirs" equally, and provided that charges against his "heirs, their husbands or wives as contracted \* \* \* by them with me," should be deducted from their share. A daughter, whose husband was indebted to testator, died before testator, leaving children.—*Held*, that the words "surviving heirs" meant surviving children, and referred to such of the testator's children as should be surviving at the date of their mother's death or remarriage, and that the children of the deceased daughter did not take. *Id.*..... 423
7. — Evidence examined and held insufficient to show that there had been a publication of a paper writing purporting to be a will, and proposed for probate, in the presence of the witnesses thereto, and hence the paper cannot be probated. *BIOREN v. NESLER* ..... 573
8. — Under section 197 of the Orphans Court act (*P. L. 1898 p. 789*), which provides that if probate of a will be refused the court may order the costs and expenses of the litigation to be



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paid by the person propounding the will or out of the estate of the deceased, the court, when ordering the expenses paid out of the estate, is authorized to include counsel fees to both sides as part of such expenses. *Id.*..... 576

9. — Fees in such cases may be allowed to counsel representing persons interested in the controversy as legatees or next of kin, who were proper, though not necessary, parties, as well as to counsel representing proponent and caveators, who were necessary parties. *Id.*..... 576

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*E. L. H.*  
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